Improving the Collection and Enforcement of Confiscation Orders in the Magistrates' Court

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A thesis submitted in partial fulfilment of the requirements of the University of Lincoln for the degree of Doctor of Philosophy

Lincoln Law School, College of Social Science

September 2020

Abstract

This thesis critically examines the rules and principles which govern the enforcement of confiscation orders in the magistrates' court.

Although confiscation orders are made in the Crown Court using the confiscation legislation, the rules for the magistrates' court enforcing them are based on the legislation developed for enforcing other financial penalties, for example fines; and confiscation orders have characteristics which are different to other financial penalties. As a result, the rules are complicated and some of the principles for enforcing confiscation orders have been developed by the judiciary interpreting the fines based legislation to fit the enforcement of confiscation orders. This has resulted in difficulties with enforcement.

This thesis asks and answers two questions. Firstly, how has the confiscation legislation developed in relation to the enforcement of confiscation orders in the magistrates' court? Secondly, what future legislative amendments might assist the enforcement of confiscation orders by the magistrates' court and create an alternative to restraint?

In answering the first question, this thesis collates, explains and critically analyses the development of the rules and principles of the powers of enforcement in the magistrates' court; and the issues about enforcement which have arisen since the introduction of the confiscation regime, an area that has received little academic attention. As such it adds to the academic research in this area of law.

This thesis will show that the confiscation legislation provides some specific powers for the magistrates' court, but in the main the application of the fines based powers are the ones that apply. Changes could be made to improve their application. It reviews the law in relation to payment orders, and the use of charging orders by HMCTS to enforce confiscation orders. It shows that the powers to enforce a confiscation where the asset is a house are cumbersome and despite the introduction of payment orders in relation to bank accounts, further improvements could be made.

In answering the second question this thesis critically analyses the development of the rules and principles of restraint orders; and charging orders made under the pre-Proceeds of Crime Act 2002 legislation. It examines the issues which have arisen in both areas and demonstrates that the changes recommended will also improve this area of law.

This thesis makes a unique contribution to the academic discussion of the enforcement of confiscation orders by examining the law and issues created by the legislation before and after the Proceeds of Crime Act 2002. It also analyses the law relating to the enforcement of confiscation orders in the magistrates' court about which little has been written academically.

Finally, this thesis recommends alternatives to restraint, namely the re-introduction of charging orders as a power available to the Crown Court, and for the Crown Court to have the power to make payment orders. It is suggested that this will assist the magistrates' court enforcing confiscation orders; and could also provide a less draconian and more effective alternative to restraint where a defendant owns a house or has cash in a bank account.

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Acknowledgements

My thanks go to my Supervisor, Professor Richard Stone for his unfailing help, support and excellent advice which he has delivered with grace and good humour at all times.

I would also like to thank my Second Supervisor, Professor Matthew Hall for his clear and timely advice, and Dawn Stokes and Dr Jack Lampkin from the University of Lincoln, for their continued assistance.

I could not have completed this research without the support of my family, friends and colleagues, including my mum Diane Naughton, and my father-in-law Lester Hourigan. However, there are two people in particular who I could not have managed without, my friend Jennifer Smith for her tireless help and support, and my husband Charles Hourigan. Without him nothing is possible.

Author's Declaration

I declare that this thesis is a presentation of original work and I am the sole author. This work has not been presented for an award at this, or any other University. All sources are acknowledged as references.

Chapter 1 Introduction

1.1 An introduction to the research

A confiscation order is a financial order made at the Crown Court which is ancillary to sentence. It is sent to a named magistrates' court for enforcement in the same way as a fine but with some differences and there are complications because of this. For consistency reference is made to the powers of 'the magistrates' court' in this research because an individual court is always responsible for the enforcement of the confiscation order. This thesis critically analyses the fines based and other enforcement provisions as they apply to the magistrates' court along with the rules relating to restraint orders. It makes recommendations for improvement and identifies areas suitable for future research.

The research author is employed by Her Majesty's Courts and Tribunals Service (HMCTS) and has had a particular interest in the enforcement of confiscation orders in the magistrates' court since 2003. She is writing in her personal capacity,[1] however, her practical experience adds a unique perspective to the research and is of use even in the reflection of issues that were not within her knowledge before undertaking this academic research.

1.2 Putting the research into context

Wood states that when explaining the confiscation regime the first thing to be aware of is that a confiscation order is a misnomer.[2] This thesis considers that the issues which exist in the regime stem in part from a disconnect between what the name suggests, that is the taking away of assets, and the reality of a confiscation order, which is a monetary order.

[1] The research author is a solicitor employed within Her Majesty's Courts and Tribunals Service (HMCTS). The work is her own and the views contained in this thesis are that of the research author and do not necessarily represent the views of HMCTS, the Ministry of Justice (MOJ) or any of its employees.

[2] Helena Wood, *Enforcing Criminal Confiscation Orders From Policy to Practice* (Royal United Services Institute, 2016) ('*Enforcing Criminal Confiscation Orders*') 4.

Although assets may have been identified as part of the confiscation order process, they may not be, and although the assets identified may be sold to satisfy an order, there is no necessity for that if the defendant can satisfy the order in some other way.

There have been a number of attempts to explain a confiscation order to make it clear that the order is for a sum of money and assets are not taken from the defendant, nor do they have to sell any assets identified at the Crown Court to satisfy the order.[3] The definition relevant in the context of this thesis is that given by the Home Office in 1997:

> A confiscation order...is an order to pay a sum of money, expressed in sterling. It is not an order transferring the title of property.[4]

The confiscation regime was introduced because the forfeiture powers in section 27 of the Misuse of Drugs Act (MDA) 1971 could not be used to take the profits of crime from defendants convicted of drugs offences, despite attempts by the judiciary to interpret the provisions to allow that to happen. The inability of the court to forfeit the proceeds of drug trafficking in *R v Cuthbertson*[5] led directly to the introduction of confiscation orders in the Drug Trafficking Offences Act (DTOA)1986 in relation to offenders convicted of drug trafficking offences as the name suggests. This Act was amended and then replaced by the Drug Trafficking Act (DTA)1994. Confiscation orders for offenders convicted of other offences were introduced by the Criminal Justice Act (CJA)1988, and this Act was also amended. For all offences committed on or after 24th March 2003, the power to make a confiscation order is contained in the Proceeds of Crime Act (POCA) 2002.

The CJA 1988 and the DTA 1994 changed the regime but the provisions were not identical and when introduced the POCA 2002 was said to have 'change[d] the

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[3] See for example, the Criminal Justice Joint Inspection, *Joint Thematic Review of Asset Recovery: Restraint and Confiscation Casework* (2010) ('Joint Thematic Review') 36; *Re Norris* [2001] UKHL 34, [2001] 1 WLR 1388 [12]; Kennedy Talbot and Martin Hinton, 'Confiscation orders: a guide to their making and enforcement' [1991] (55) J Crim L 504, 515.

[4] Home Office, *Confiscation and Money Laundering: Law and Practice A Guide for Enforcement Authorities* (TSO 1997) ('Home Office Guide') 5.

[5] *R v Cuthbertson* [1981] AC 470 (HL).

landscape'[6] as the same statutory provisions applied for all defendants convicted of criminal offences. However, POCA 2002 has already required amendment, including recently by the Policing and Crime Act 2009, the Crime and Courts Act 2013, the Serious Crime Act (SCA) 2015, the Modern Slavery Act 2015[7] and the Criminal Finances Act (CFA) 2017. This research highlights the complexities in key areas of the regime and concludes that despite numerous amendments to POCA 2002, further legislative amendments are required.

POCA 2002 is a large Act[8] and contains other provisions which impact on the magistrates' court but are not relevant to this thesis, for example, it allows for the civil detention and forfeiture of cash,[9] and contains offences of money laundering.[10] The confiscation order provisions are contained in Part 2 of the Act[11] and this thesis focuses on the enforcement provisions of the Act and the powers of the magistrates' court to enforce once a confiscation order has been made. It is not within the scope of this thesis to address all the problems with the regime, or all of the issues faced by the magistrates' court. Instead it identifies issues where the asset is a bank account or a house, and the use of fines based and confiscation specific powers of enforcement in the magistrates' court. It also considers whether changes to the legislation in relation to charging orders and payment orders could address some of the problems experienced by the magistrates' court; and at the same time meet some of the concerns raised with the use of restraint orders.

This research only considers the regime as it applies in England and Wales as the law is different in the rest of the UK. It also only considers the law as it applies to defendants

[6] Woolf, LCJ, in the forward to Ian Smith and Tim Owen, (eds), *Asset Recovery: Criminal Confiscation and Civil Recovery* (Butterworths 2003).
[7] The changes brought about by the Modern Slavery Act 2015 fall outside the scope of this thesis.
[8] It contains 12 Parts and 12 schedules.
[9] Contained in POCA 2002, Pt 5.
[10] Contained in POCA 2002, Pt 7.
[11] Confiscation is a narrower concept than 'asset recovery', a point identified by Colin King and Clive Walker, 'Emerging Issues in the Regulation of Criminal and Terrorist Assets' in Colin King and Clive Walker, (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Routledge 2014) 7-8. For the purposes of this research and the review documents in chapter 2, 'Asset Recovery' includes the other powers in POCA 2002 for example civil recovery, whereas this thesis concentrates on 'confiscation' in Part 2 of the Act.

aged 18 or over as the enforcement powers of the magistrates' court differ for youth defendants. This does not impact on the recommendations of this thesis and would add a further layer of complexity which would not be relevant or helpful.

Although there are some differences in the wording of the relevant provisions of POCA 2002 to its predecessors which will be examined where relevant in this thesis, the principles which apply to the making of a confiscation order have in essence remained the same, as has been confirmed by the case law.[12] As a result, this thesis concentrates on the procedures in POCA 2002, especially in relation to the imposition of confiscation orders, except where the provisions of the earlier legislation are relevant to the issues relating to the enforcement of confiscation orders. The development of the legislation is considered in more detail in chapter 3.

1.2.1 The Imposition of a confiscation order

A confiscation order can only be made by the Crown Court if a defendant has been convicted of a criminal offence and they have benefited financially from their crime and it is an order ancillary to sentence. The Crown Court will identify assets available to the defendant to pay the order; or determine that there are assets which cannot be found, a 'hidden assets' order; and then make a financial order which the magistrates' court will

[12] See for example *R v Islam* [2009] UKHL 30, [2009] 1 AC 1076 in which it was said that although the current provisions had become more complicated, the concepts on which the confiscation provisions in POCA 2002 were based have been part of the law for several decades. In *R v Modjiri* [2010] EWCA Crim 829, [2010] 1 WLR 2096 the court took into account that there was no material difference between the provisions in POCA 2002, and the DTOA 1986. In *R v Ahmad and Ahmed* [2014] UKSC 36, [2015] 1 AC 299 the court considered two joint appeals, one against orders made under the CJA 1988, the other against orders made under POCA 2002. The Court considered the different language in relation to confiscation orders made under POCA 2002 and the CJA 1988 and held that for these purposes there were no material differences between the language used and therefore the provisions of POCA 2002 should be considered. In *R (on the application of Gibson) v Secretary of State for Justice* [2018] UKSC 2, [2018] 1 WLR 629 the court considered an appeal against a confiscation order made under the DTA 1994 and said that case law on enforcing pre-POCA 2002 is not just of historical interest because even though the law has been repealed and replaced, POCA 2002 contains similar issues even if the wording is not identical.

collect and enforce as a fine, though with some differences. As has been noted, the name of the order is a misnomer because nothing is in fact confiscated.

This is considered in chapter 3 which also explains that the Crown Court will set time for the defendant to pay the order and if the defendant does not pay within that time interest will accrue. The rate of interest is the same as that for the time being specified in section 17 of the Judgments Act 1838 which is currently 8% per annum. In addition, the court will also impose a term of imprisonment in default of payment which must run consecutively to any period of imprisonment imposed as a sentence for the substantive offence. It is the magistrates' court which decides whether or not to activate the default term, but even if the defendant serves the default term it does not wipe out the debt. Both the interest provisions and the default term are enforcement sanctions designed to encourage the defendant to pay voluntarily[13] but their effectiveness has been called into question.[14] As well as being described as a misnomer, the confiscation regime is acknowledged as draconian. However, overall the regime has been held to be compliant with the European Convention on Human Rights (ECHR).[15]

Therefore, a confiscation order is an order in personam not in rem[16] but, if possible, the Crown Court will identify assets as suitable for satisfying the confiscation order when it is made. There can be a delay of up to 2 years after sentencing before a confiscation order is made and there is no requirement for the defendant to use those assets to satisfy the order; he could satisfy it by some other means. If the assets are sold and they fail to make enough money to pay the confiscation order in full, then an application can be made to have the order reduced but, unless there is a restraint order, there is nothing to stop the defendant from dissipating the assets. The confiscation order is made by the Crown Court and then registered in a magistrates' court for enforcement. Clearly the magistrates' court comes at the end of the enforcement process and this in itself causes

[13] *R v Lyons* [2014] EWCA Crim 1306 [13].
[14] This is discussed in Chapter 5. For interest, n 1053; for the default term, n 1173.
[15] These points are analysed in chapter 3, text to n 497-n 515.
[16] See for example *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57.

issues which are analysed in chapters 5 to 7. This thesis concentrates on the enforcement of orders, and therefore does not seek to add to the analysis of the imposition of confiscation orders.

1.2.2 Restraint orders

Restraint orders are the main method by which assets are secured to ensure that they are available to satisfy the confiscation order. They, along with the power to make a charging order in the pre-POCA 2002 legislation, were introduced to be used in complex and high value cases leaving the enforcement of other cases to the magistrates' court using its fines based powers.[17] This thesis shows that restraint orders can be effective in preventing the dissipation of assets, but demonstrates in chapter 4 that a perceived reluctance to use them and issues to do with costs mean that they are not used as widely as they can be. After critically analysing these orders, this thesis begins to make recommendations which would provide the Crown Court with the power to make other orders to prevent dissipation without the disadvantages of restraint. This chapter also explores the power the Crown Court had in the pre-POCA 2002 legislation to make a charging order as an alternative to a restraint order and recommends the introduction of a similar provision in POCA 2002.

1.2.3 Enforcement of confiscation orders in the magistrates' court

Despite the fact that the imposition of the confiscation order is made by the Crown Court using POCA 2002, the enforcement powers of the magistrates' court are based on the Magistrates' Courts Act (MCA) 1980 which was designed for the enforcement of other financial penalties, for example fines, not confiscation orders. In order to follow the legislative path to the enforcement provisions in the magistrates' court, there is a need to consider the provisions of POCA 2002,[18] the Powers of Criminal Courts (Sentencing) Act

[17] 'The UK Drug Trafficking Offences Act 1986' (1987) 13 Commw L Bull 1628, 1632.
[18] POCA 2002, s 35. Similar provisions were contained in the pre-POCA 2002 legislation and are explored in chapters 5 and 6.

(PCC(S)A) 2000 and MCA 1980 as modified by section 35 POCA 2002. This is examined in more detail in chapters 5 and 6 but judiciary hearing appeals from the magistrates' court have found the process far from straightforward, describing the statutory provisions in different Acts as a 'labyrinth',[19] struggling to obtain a clear grasp even with the help of counsel, and acknowledging that to use the provisions involves following a 'formidable trail' through the relevant legislation.[20] Even after following this trail through the legislation the Supreme Court acknowledged that the powers of enforcement in MCA 1980 were not designed for magistrates' courts to enforce confiscation orders, and that this causes difficulties with the enforcement of them.[21]

This thesis explains that the confiscation legislation has been amended many times since the DTOA 1986 in order to address a number of issues including issues with the collection and enforcement of confiscation orders. Despite this, very few legislative changes have been made to the enforcement powers of the magistrates' court and some of the case law has placed additional burdens on the court.

The ultimate sanction that the magistrates' court has is the activation of the default term set by the Crown Court. However, this is not always straightforward. Serving the default term does not wipe out the debt and interest continues to accrue, and there is a need for effective non-custodial alternatives to the activation of the default term. One of the enforcement actions available to the magistrates' court is the power for the designated officer for the magistrates' court to apply for enforcement in the High Court or county court. However, there are issues with this process which are critically analysed in chapters 5 and 7. Like restraint orders, this can be effective, but the process is complicated and not used in practice. Therefore, this thesis makes recommendations for alternatives.

[19] *North Kent Magistrates' Court v Reid* (Ch, 4 April 2001) (Park J).
[20] *R v Hastings and Rother Magistrates' Court ex parte Anscombe* (1998) 162 JP 340 (QB) (Schiemann LJ).
[21] *Gibson* (n 12) [12].

1.2.4 Lead agencies

The management of confiscation orders is not straightforward. The magistrates' court is responsible for the collection and enforcement of all confiscation orders, and a post holder called the designated officer undertakes some enforcement action on behalf of the magistrates' court.[22] These actions include applications for enforcement in the High Court and county court for third party debt orders and charging orders. As the applications are made by the designated officer, his role is important to this research.

Prior to the creation of Her Majesty's Courts Service (HMCS) on 1 April 2005 magistrates' courts were governed by magistrates' courts committees led by justices' clerks. From 1 April 2011, HMCS integrated with the Tribunals Service and became Her Majesty's Courts and Tribunals Service (HMCTS). As a result, any references in the review documents to the role of the justices' clerk and their functions, or HMCS in relation to confiscation, apply to the designated officer and HMCTS unless mentioned.

HMCTS, which is an executive agency sponsored by the MOJ, is the agency accountable for the debt.[23] It is responsible for the administration of the criminal, civil and family courts and tribunals in England and Wales[24] and as such HMCTS is accountable for the enforcement of confiscation orders in England and Wales. It has set up Regional Confiscation Units (RCUs) to carry out this administration and publishes the details about

[22] During the period of the confiscation legislation the organisation of the Courts Service has changed. At the time of the introduction of the DTOA 1986 the justices' clerk was responsible for collecting and applying payments received and taking enforcement action in the High Court and county court. This role was taken over by the justices' chief executive with effect from 1 April 2001 as the post was created by the Access to Justice Act 1999. It was then taken over by the designated officer for the magistrates' court on 1 April 2005. The post was created by the Courts Act 2003. The justices' clerk retains other functions including judicial functions as contained in sections 27-29 of the Courts Act 2003.

[23] Although the Chief Executive of HMCTS is responsible for the collection of confiscation orders and is the accounting officer, there are areas within the system of controls and reporting for which she has no responsibility and the Trust Statement makes it clear that the Home Office bears overall responsibility for policy. Her Majesty's Courts & Tribunals Service, *HM Courts & Tribunals Service Trust Statement 2017-18* (HC 2017-18,1332). ('HMCTS Trust Statement 2017-18') 27.

[24] 'What the HM Courts & Tribunals Service does' <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service> accessed 31 December 2018.

collection and enforcement in its annual Trust Statement. However, the MOJ has the ultimate responsibility for all confiscation orders[25] and the Home Office is responsible for the policy and legislation surrounding the orders.[26]

Even though HMCTS is the agency with the accountability for confiscation orders, other agencies will take the lead for enforcement in certain circumstances and become known as the lead agency. For example, the prosecution, often the Crown Prosecution Service (CPS), will be the lead agency if they have obtained a restraint order but HMCTS will be the lead agency if no other agency has taken the lead, or if another agency cannot take any further steps to assist with the enforcement of an order. However, the amount of the order does not in itself determine who is responsible for enforcing the order, this will depend on a number of factors.

To assist agencies the Joint Asset Recovery Database (JARD) was introduced in 2006. JARD is a shared IT resource used by criminal justice agencies to record and track confiscation orders and other methods of asset recovery. It should be updated at the restraint, confiscation and enforcement stages[27] and it is dependent on law enforcement agencies updating results. JARD is managed by the NCA and the data is subject to change on a daily basis as cases proceed and new cases are added and resolved.[28] It provides statistics which have been relied upon in the review documents in chapter 2 and other research.[29]

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[25] Ministry of Justice and HM Courts and Tribunals Service, Written Evidence to the Home Affairs Committee, *Proceeds of Crime* (HC 2016-2017, 25) para 21 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/proceeds-of-crime/written/29577.html> accessed 16 August 2016.

[26] Home Affairs Committee, *Proceeds of Crime* (HC 2016-2017, 25) ('HAC 2016 Report') 31.

[27] The Joint Thematic Review found it was almost always kept up to date (n 3) 47.

[28] *Asset Recovery Statistical Bulletin 2011/12-2016/17* (Statistical Bulletin 15/17, Home Office 2017) 3, 11.

[29] For example, Karen Bullock and others, *Examining attrition in confiscating the proceeds of crime* (Home Office 2009); Jackie Harvey, Asset Recovery: Substantive or Symbolic?' in Colin King and Clive Walker, (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Routledge 2014); Peter Sproat, 'A critique of the official discourse on drug and sex trafficking by organised crime using data on asset recovery' (2012) 19(2) Journal of Financial Crime 149.

The need to improve the collection and enforcement of HMCTS led cases is the focus of this research, but issues where other agencies are the lead have also been included where relevant. This is because even if another agency is the lead agency HMCTS (and therefore magistrates' courts) have been criticised for the failure to realise the amount ordered in a confiscation order. In addition, once another lead agency has done as much work as possible to enforce a confiscation order, it will be passed to HMCTS who will take over the lead role. As a result, the importance of agencies working together has also been recognised as a factor in improving the collection and enforcement of confiscation orders.[30]

1.3 The research questions

This thesis asks and answers two questions. Firstly, how has the confiscation legislation developed in relation to the enforcement of confiscation orders in the magistrates' court? Secondly, what future legislative amendments might assist the enforcement of confiscation orders by the magistrates' court and create an alternative to restraint?

In order to answer the two research questions, and to make recommendations, this thesis will first analyse the relevant issues which have been identified in the government research, and the legislative changes which have been introduced as a result. This is done in chapters 2 and 3. It is also necessary to understand what would be a successful change which is why chapter 3 considers the purpose of the confiscation regime and starts to review the purpose of the enforcement powers currently available. It shows that the lack of clarity in various aspects of the regime has hindered the measurement of successful enforcement and demonstrates a move away from the amount of cash being collected as the definition of success, towards a measurement of disruption as an alternative measure of success.

[30] This is considered in chapter 6, text to n 1264-n 1269.

It is suggested that the recommendations in this thesis should be measured against the main purposes of the regime but also a specific purpose of POCA 2002. The Proceeds of Crime Bill-Publication of Draft Clauses Consultation Paper described the changes in what would become POCA 2002 as the creation of a 'one stop shop' in relation to confiscation orders at the Crown Court.[31]

Before critically analysing the fines based powers and looking for alternatives it is also necessary to consider the effectiveness of the law in relation to restraint. This is done in chapter 4 which will show that restraint orders have been the subject of criticism and, despite legislative amendment, issues with restraint orders remain. This chapter also considers the pre-POCA 2002 powers for the Crown Court to make a charging order and starts to explain how the recommendations in this thesis will address those difficulties. It will lead to recommendations for changes to the legislation to allow the Crown Court to make charging orders and payment orders in all confiscation order cases as an alternative to restraint.

The development of the powers of the magistrates' court to enforce confiscation orders is critically analysed in chapters 5 to 7 and shows a need for magistrates' courts to have effective non-custodial powers. In chapter 5, the current rules where the asset is money in a bank account are critically analysed and recommendations made for improvement. One of the changes in POCA 2002 was the introduction of payment orders in POCA 2002 which allow a magistrates' court to make an order requiring a bank or building society to pay over money belonging to a defendant to satisfy a confiscation order. These are analysed in this chapter along with the changes to the provisions which leaves cash in an account at increased risk of dissipation. The power for the designated officer for the magistrates' court to apply to the county court for a third party debt order where the asset is money in a bank account is also analysed and then compared with the power to make a payment order. An analysis of the powers of the designated officer to apply for a charging

[31] Secretary of State for the Home Department, *Proceeds of Crime Bill: Publication of Draft Clauses* (CM 5066, 2001) paras 2.7, 50, 57, 66 and 70.

order using the fines-based legislation where the asset is a house is undertaken in chapter 7 along with a comparison with the charging order provisions of the pre-POCA 2002 legislation.

In considering these sanctions and the rules which govern the powers of the magistrates' court, the complexity of the powers has become apparent. Therefore, as a secondary recommendation it is recommended that further research should be undertaken to consider further amendments to section 35 POCA 2002.[32]

This thesis will not address all the issues in relation to the enforcement of confiscation orders as this would be too great a task for one thesis. Instead it analyses the options available to the magistrates' court and the rules which the court must comply with in the enforcement hearing before activating the default term. It considers in detail options where the asset is cash in a bank account or a house, making recommendations in respect of those. It also identifies other areas suitable for further research.

1.4 The need for the research

The fact that the enforcement of confiscation orders is difficult is acknowledged by Bullock and Lister.[33] Chapter 2 of this thesis begins to explain some of the difficulties with their enforcement, which is expanded upon in chapters 4 to 7. There have also been specific criticisms about the amount of orders outstanding which are reproduced with the latest imposition and collection rates in Appendix 1. Despite the criticism in some ways the collection rates of HMCTS led cases has stood up well to scrutiny[34] but more can be done.

[32] This section dictates which of the fines based enforcement powers are available to the magistrates' court when dealing with confiscation orders.
[33] Karen Bullock and Stuart Lister, 'Post-Conviction Confiscation of Assets in England and Wales: Rhetoric and Reality' in Colin King and Clive Walker, (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets,* (Routledge 2014) 67.
[34] This is considered in the next chapter, text to n 336, n 351 and n 355.

1.4.1 Previous literature

A traditional literature review has not been attempted in this thesis for two reasons. Firstly, it will be shown there is limited literature on the collection or enforcement of confiscation orders, particularly into the powers of the magistrates' court. Secondly, the literature that is applicable will be engaged with in the relevant chapters. However, it Is important to put this research into context.

In 2009 Bullock et al conducted research on behalf of the Home Office[35] which is analysed in chapter 2 and has provided rich material on the practical use of restraint in chapter 4. The authors concluded that there is no extensive body of research into asset recovery in the UK[36] but this is not the first or last time that the point has been made. When Levi was writing in 1997 and comparing the principles of taking the profit out of crime in the US and the UK, he noted an 'almost complete absence of interest among British academics'.[37]

However, it would be wrong to say that nothing has been written about asset recovery or confiscation. Levi has written continuously about various aspects of asset recovery, the last article of Levi's included in this research was written in 2018.[38] Although his work often relates to areas outside of this research, it has been included where relevant. Levi first interested Alldridge in the proceeds of crime[39] and he is another academic who has been writing on the topic for some time. Alldridge's work also often concentrates on areas other than the enforcement of confiscation orders, for example on whether the law on the imposition of confiscation orders complies with the European Convention on Human

[35] Bullock and others (n29).
[36] Ibid 3.
[37] Michael Levi, 'Taking the Profit out of Crime: The UK Experience' (1997) 5 Eur J Crime Crim L & Crim Just 228, 229.
[38] Michael Levi, 'Reflections on Proceeds of Crime: A New Code for Confiscation?' in JJ Child and RA Duff, (eds), *Criminal Law Reform Now Proposals & Critique* (Hart 2018).
[39] Peter Alldridge, *Money Laundering Law Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart, 2003) vi.

Rights (ECHR) and civil recovery[40] or tax evasion.[41] However, his insights, along with those of other academics can cross over to enforcement and have been included where they meet.

In 2014 King and Walker identified that there has been a lot written about 'follow the money' techniques, especially with regard to money laundering,[42] and identified that a newer field of academics have considered the regime.[43] These newer academics include Bullock who followed her research for the Home Office in 2009 with an article drawing on the data from that research and examined the processes for enforcing confiscation orders[44] describing them as a 'relatively poorly understood financial penalty.'[45] Whilst understanding of confiscation orders has developed since Bullock's work, this research will show that her statement is still applicable and there are difficulties understanding the complicated enforcement provisions. As noted, members of the judiciary have expressed difficulties when trying to understand the legislative provisions that apply to the enforcement of confiscation orders in the magistrates' court, and Wood's findings are that restraint is a poorly understood area.[46]

Vettori's findings in 2006 where that there is an almost complete lack of a review of the provisions to enforce confiscation orders from beginning to end,[47] and in spite of the more recent literature, her conclusions still resonate today. Her research covered 15 countries in the European Union and included a review of the UK provisions. Although the UK was the country which paid the closest attention to confiscation,[48] she identified that the

[40] See for example Peter Alldridge, 'Proceeds of Crime Law since 2003-Two Key Areas' [2014] (3) Crim LR 171.
[41] See for example Peter Alldridge and Ann Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 Legal Stud 353.
[42] King and Walker (n 11) 5.
[43] ibid 6.
[44] Karen Bullock, 'Enforcing Financial Penalties: The Case of Confiscation Orders' (2010) 49(4) Howard Journal 328.
[45] ibid 328.
[46] Helena Wood, *The Big Payback Examining Changes in the Criminal Confiscation Orders Enforcement Landscape* (Royal United Services Institute, 2016) ('The Big Payback') 5.
[47] Barbara Vettori, *Tough on Criminal Wealth Exploring the Practice of Proceeds from Crime Confiscation in the EU* (Springer 2006) 20.
[48] ibid 19.

existing literature deals mainly with the investigation phase and the judicial phase, but that the disposal phase is 'almost totally neglected'.[49] This thesis focuses on the enforcement powers of the magistrates' court in England and Wales and so differs from Vettori's yet she is convincing in arguing that this is a 'neglected and low profile subject'.[50] This is so even though she highlights the importance of the enforcement of confiscation orders to the overall effectiveness of the regime.[51]

In keeping with Vettori's findings, as well as co-authoring a report on restraint, Bullock has published research on the investigation phase[52] and how benefit is calculated in practice at the Crown Court concentrating on POCA 2002.[53] Her research is not only relevant because it has been engaged with when apposite, but because her work on attrition and the practicalities of the process on imposition has been continued by Kruisbergen et al.[54] They define attrition as the gap between estimated criminal profits and the amount actually recovered.[55] Their research differs from this thesis in that they consider organised crime cases in the Netherlands, and attrition from before a confiscation order is made, namely from the estimate of benefit, whereas the focus of this research is in England and Wales and the difficulties with enforcement after a confiscation order is made. Nonetheless Kruisbergen et al consider the previous research which they show is limited, especially in relation to collection rates.[56] They explain that their work is one of the few studies that includes the collection of confiscation orders and call for more insight into the decision making and problems during the collection stage to enhance the understanding of and 'point to possibilities' to improve them.[57]

[49] ibid 20.
[50] ibid 119.
[51] ibid 20.
[52] Karen Bullock, 'The Confiscation Investigation: Investigating the Financial Benefit Made from Crime' (2010) 4(1) Policing 7.
[53] Karen Bullock, 'Criminal Benefit, the confiscation order and the post-conviction confiscation regime' (2014) 62 Crime Law Soc Change 45.
[54] Edwin W Kruisbergen, Edward R Kleemans and Ruud F Kouwenberg, 'Explaining attrition: Investigating and confiscating the profits of organized crime' (2016) 13(6) Eur J Criminol 677.
[55] ibid 677.
[56] ibid 679.
[57] ibid 692.

Although research has been conducted on the working of confiscation orders for many years, and there has been research into the enforcement of confiscation orders in the UK since Vettori, there is little into the powers of the magistrates' court. This thesis will show that even though there has now been more research into the enforcement of orders, it has often concentrated on restraint orders as the main method of enforcement, or the workings of POCA 2002. Yet magistrates' courts are responsible for enforcing all orders and are still enforcing confiscation orders made under the pre-POCA 2002 legislation.

Other academics have been included in this research because of their application to the research topic and their work engaged with in the relevant chapters. The author is also fortunate in that practitioners in the field have edited textbooks on the subject[58] or commented on aspects of the regime,[59] amendments to the legislation,[60] and case law pertinent to this research[61] complementing the author's personal knowledge of the practices and procedures of the magistrates' court and HMCTS. These too have been included where applicable.

However, this thesis attempts to answer the call by Kruisbergen et al for more insight into the problems on enforcement, concentrating on the powers of the magistrates' court, to make recommendations for improvement. It also considers confiscation orders made under the pre-POCA 2002 legislation as well as POCA 2002, as these orders are still being made and enforced.

Instead of just relying on the available academic literature, chapter 2 analyses various reviews of the confiscation regime, including that conducted by academics, some of whom have also included the relevant law at the time. In addition, policy documents and reviews

[58] For example Mark Sutherland Williams, Michael Hopmeier and Rupert Jones, (eds), *Millington and Sutherland Williams on the Proceeds of Crime* (5th rev edn, Oxford University Press 2018); *Mitchell Taylor and Talbot on Confiscation and the Proceeds of Crime*.

[59] For example, Peter Brunning, 'Payment Orders in Confiscation Order Enforcement' (2012) 176 JPN (47) 684.

[60] For example, Jonathan Fisher, 'Part 1 of the Serious Crime Act 2015: Strengthening the Restraint and Confiscation Regime' [2015] (10) Crim LR 754.

[61] For example, Fortson R 'R. v Dad (Amer Hussain); R. v Dad (Nadeem); R. v Dad (Munsif): confiscation-confiscation proceedings jointly obtained benefit' [2015] (5) Crim LR 357.

undertaken on behalf of the government which have raised issues about the enforcement of confiscation orders and have led to changes in the legislation, have also been researched. These are referred to in this thesis as the 'review documents' and include official publications. Their inclusion and the analysis of them adds a unique contribution to the academic research in this area of law.

1.4.2 The practical need for the research

For the confiscation order regime to be effective, recovery must also be effective,[62] and any issues addressed.[63] Bullock concludes that a failure to enforce can remove any deterrence effect, reducing the amount of sums recovered and undermining public confidence in the criminal justice system.[64]

This thesis shows a practical need for the research. The analysis of the review documents show that issues have existed with the confiscation regime since its inception, including with enforcement. Although improvements have been made with changes to the law and practical changes implemented, difficulties remain, and some of those identified at the start of the regime have not been addressed. In chapter 2 the analysis of the review documents considering the powers of magistrates' courts show there have been few recommendations for change.

The analysis of the powers of enforcement in the magistrates' court shows the complexity in the regime and the limitations if restraint is not used. The analysis of the use of restraint orders shows there is clearly a need for effective restraint[65] and it would be difficult to argue with Levi's view that the elapsed time between the offence or obtaining

[62] Secretary of State for the Home Department, *Serious and Organised Crime Strategy* (CM 8715, 2013) ('2013 Serious and Organised Crime Strategy') 35; Vettori (n 47) 20.
[63] Home Affairs Committee, *Third Report: Organised Crime* (HC 1994-95, 18) ('HAC Organised Crime Report') xlix.
[64] Bullock, 'Enforcing Financial Penalties' (n 44) 337.
[65] The analysis is contained in chapter 4, n 913-n 934.

profits, to funds being stopped by pre-conviction restraint or post-conviction orders, is critical for recovery.[66]

However, there are issues with the use of restraint which means they are not always used even when the order would be available. The Crown Court has a discretion in relation to restraint, but that discretion is whether to make a restraint order or not. This is a stark choice and there is no discretion for the Crown Court to make an order which is an alternative to a restraint order.[67] Without a restraint order, assets are at an increased risk of dissipation and being unavailable to the magistrates' court to satisfy the confiscation order. This thesis posits that the Crown Court should have a discretion to make an alternative order which has the same effect as a restraint order namely of preserving the asset where it is a house or cash in a bank account, to keep them available to satisfy the confiscation order. The recommendations are that the Crown Court should have the power to make a charging order and payment order, powers which are considered in chapters 5 and 7 respectively.

The topicality of this research is highlighted by the fact that the Law Commission has a project which it announced on 7th November 2018. This is to review the existing conviction based confiscation regime and the Commission will publish a consultation in 2019.[68] The Law Commission attracted a reference from the Home Office on confiscation under POCA 2002 and although this does not form part of the 13th Programme of Law Reform for the Law Commission, the details are included in that document.[69]

The project will consider Part 2 of POCA 2002 and is seen as a necessary project by the Commission because the confiscation rules on imposition are seen as excessively complex with judges not having all of the necessary expertise and confidence. Issues

[66] Levi 'Reflections on Proceeds of Crime' (n 38) 5.
[67] The Crown Court can make a compliance order, but it does not preserve the asset to make it available to the magistrates' court.
[68] Law Commission, 'Confiscation regime review to ensure crime doesn't pay' (*Law Commission*, 7 November 2018) < https://www.lawcom.gov.uk/confiscation-regime-review-to-ensure-crime-doesnt-pay/> accessed 24 November 2018.
[69] Law Commission, *Thirteenth Programme of Law Reform* (Law Com No 377, 2017).

have been identified because the proceedings are time consuming, and there are errors, appeals, injustices, and a limitation on the number of confiscation orders made. In addition, directly relevant to this research the Commission has referenced the limitations on enforcing confiscation orders, which results in problems with recovery, and undermines public confidence and the principle that 'crime does not pay.' In particular the Commission noted that the interest provisions and default terms are ineffective as in 2012 only 2% of orders were paid in full after the activation of default; and that the magistrates' court lacks 'sufficient or adequate powers to enforce confiscation orders effectively'.[70]

Since POCA 2002 was enacted, the government reports and other reviews have concentrated on the operation of that Act. In this research all the issues relevant to this thesis that have arisen since *Cuthbertson* and the regime was created have been reviewed. As well as identifying those issues, recommendations have been made to address them through changes to the legislation in relation to charging orders and payment orders.

1.5 Conclusions and Recommendations

Chapter 8 contains the conclusions and recommendations of this thesis. Part of the problem is the nature of a confiscation order, and the way the regime has developed. In 2013 the NAO acknowledged that the confiscation of criminal assets has always been difficult to achieve despite changes in the legislation.[71] This has also been acknowledged by the judiciary, and in *R v Soneji*[72] Lord Steyn stated:

> Given the almost year by year amendment over the last 20 years of sometimes overhasty criminal legislation, and the great difficulties created for the courts by

[70] ibid 23-24.
[71] National Audit Office, Confiscation Orders (HC 2013-14 738) ('NAO Report') 12.
[72] [2005] UKHL 49, [2006] 1 AC 340.

much of this flood of legislation, it would be innocent to predict that the 2002 Act has solved the problems involved in the criminal process of confiscation.[73]

In fact, this thesis shows that Lord Steyn was right and POCA 2002 has not solved all the problems with confiscation orders, although some have been addressed.

This thesis answers the research questions by making recommendations for changes in the legislation. After reviewing the practical experiences of the magistrates' court enforcement provisions, it shows that the limitations of the powers of the magistrates' court can be met by the re-introduction of confiscation charging orders but with further amendments. This would create a less draconian alternative to restraint to improve the preservation of property early in the process and enable confiscation orders to be satisfied, thereby improving the collection and enforcement powers of the magistrates' court. It also recommends changes to the payment order provisions as a further alternative to restraint and makes secondary recommendations for further research. The conclusions to this thesis also show how the recommendations will fit in with the purpose and aims of the legislation.

1.6 Research Methodology and Theoretical Background

1.6.1 Doctrinal and Critical Analysis

This thesis collates, and critically analyses the rules and principles in the enforcement of confiscation orders by magistrates' courts in England and Wales, supplemented by a critical analysis of the rules in relation to the use of restraint orders, charging orders and payment orders. Given the development of the regime, it includes an examination of the history and the purpose of confiscation orders. Twining explains that terms such as 'rule' can have a broad meaning and can encompass a more general prescription, including for example, principles, guidelines and standards and material such as history, statistics 'and much else besides' to provide at the very least some necessary background to legal

[73] ibid [3].

rules.[74] This broad definition has been adopted in relation to this research. As a result, the analysis examines the attempts at consistency in the legislation and whether the enforcement provisions achieve the stated aim of the legislation and allow the judiciary to easily interpret the legislation.

Although this thesis uses this approach of critically examining the law in relation to the imposition of confiscation orders, a detailed review of the law of imposition falls outside the scope of this research. Instead it concentrates on the development of the law in relation to the enforcement of confiscation orders in the magistrates' court and identifies the current rules. This has been a challenge given the changes in both the legislation and the principles of enforcement brought about by the case law, but it includes the law up to and including 31 December 2018.

The analysis of the policy behind the confiscation laws show that there is still a lack of clarity in some quarters about the overall aim and this, and the examination of the history of the legislation, shows where gaps in the rules led to changes in the legislation and where further changes are required in relation to the enforcement of confiscation orders. In summary this research focuses on the rules in order to examine if the purpose of the law is being fulfilled and makes recommendations for legislative amendment.

Doctrinal research has been defined as asking what the law is in a particular area which involves a review of case law and legislation. It can include a review of journal articles and is often done from an historical perspective. Even if there is no empirical research, inferences can be drawn,[75] and this thesis uses doctrinal analysis to 'give sense and order'[76] to the rules.

[74] William Twining, *Blackstone's Tower: The English Law School* (Sweet & Maxwell, 1994) 174-175.
[75] Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui, (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 18-19.
[76] Pauline C. Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in Mark van Hoecke, (ed), *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Hart 2013) 91.

This doctrinal analysis reviews the law of enforcing confiscation orders in the magistrates' court and the law of restraint from its inception, and texts authored by practitioners have also been used to outline the past and current practice.[77] Although this has an element of an historical analysis it should not be considered as legal history. HMCTS is still responsible for enforcing confiscation orders made under the pre-POCA 2002 legislation;[78] and the rules, especially in relation to orders made under the CJA 1988 and the DTA 1994, are still being considered in case law.[79] Judges have said that case law on enforcing pre-POCA 2002 is not just of historical interest because even though the law has been repealed and replaced, POCA 2002 contains similar issues even if the wording is not identical.[80]

Research conducted by others has been critically analysed in this thesis. This has included the secondary analysis of data in that research which has supplemented the review of the rules and issues in this thesis. This secondary analysis has been used in this research because of the advantages in the fact that it has been gathered over a long period of time, conducted by different researchers, some conducted on behalf of the government, and in addition it all relates directly to the confiscation order regime.

There have been criticisms of doctrinal analysis. It has been said that doctrinal research risks being sterile with nothing new to offer,[81] or conservative,[82] or too descriptive.[83] However, this thesis is not just descriptive, and the research does offer 'something new'.

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[77] n 58.
[78] The aged debt figures per agency are reproduced in Appendix 1 which include orders made under the pre-POCA 2002 legislation. This is also within the experience of the research author.
[79] See for example the key cases in this thesis, *Ahmad and Ahmed* (n 12); *Gibson* (n 12); *R v May* [2008] UKHL 28, [2008] 1 AC 1028; and *R (on the application of O'Connell) v Westminster Magistrates' Court* [2017] EWHC 3120 (Admin).
[80] *Gibson* (n 12).
[81] Michael Pendleton, 'Non-empirical Discovery in Legal Scholarship-Choosing, Researching and Writing a Traditional Scholarly Article' in Mike McConville and Wing Hong Chui, (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 163.
[82] Michael Salter and Julie Mason, *Writing Law Dissertations An Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited, 2007) 100.
[83] Mark van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark van Hoecke, (ed), *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Hart 2013) 3.

The review documents are critically analysed and in the main are split into two camps, those that review the law pre-POCA 2002; and those that review POCA 2002. This research takes a different view and considers all the relevant legislation before and since POCA 2002. It is therefore able to provide an insight that previous research has not and that along with the analysis has led to the recommendations in chapter 8. This shows the advantages to the traditional doctrinal analysis, the critical analysis, the analysis of the secondary data in this thesis and the unique contribution this research makes.

The review of the rules including the review documents have highlighted problems for the magistrates' court when enforcing confiscation orders. This has led to an analysis of the rules and issues in relation to restraint orders, another method seen as an important way of enforcing confiscation orders.

McConville states that 'research is very often about chance or serendipity.'[84] As regards this research, in the course of her employment the research author became aware of the fact that HMCTS had applied for a number of charging orders to enforce confiscation orders. As a result, she was able to obtain permission to use the data from those applications[85] and was able to ask a number of questions to elicit the secondary data about the applications. This is equivalent to a Freedom of Information request and has resulted in the secondary data used in chapter 7.

1.6.2 The use of 'insider research'

The knowledge of the charging order applications is not the only relevance of the research author's experience of working for HMCTS. One of the reasons for conducting the research was the practical experience of the research author and a desire to undertake research in this area. The intention was to provide a detailed insight into the issues for the magistrates' court enforcing confiscation orders and make recommendations for

[84] Mike McConville 'Development of Empirical Techniques and Theory' in Mike McConville and Wing Hong Chui, (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 209.
[85] HMCTS, the Home Office and the National Crime Agency have given permission for the information to be used.

practical improvements in this area of law. She expected to find a lot of previous research into the enforcement of confiscation orders in the magistrates' court but did not. Her employment gave her an opportunity to bring a novel perspective to the research, as an 'insider', and if that viewpoint had not been taken into account the scope and findings of the research would have been poorer as a result.

The advantages of being an 'insider' in this research are twofold.[86] Firstly, being an 'insider' means that the researcher can comment on the provisions from a subjective or practical viewpoint, as well as from an objective researcher point of view after the doctrinal analysis. This has resulted in the addition of a unique voice when critically analysing the changes in the legislation and case law directly impacting on the powers of the magistrates' court to enforce confiscation orders in chapters 5 to 7. This has enabled her to comment on the workings of the legislation in practice in a number of areas including, for example, the time for payment provisions and the use of attachment of earnings orders.

Secondly, because of the background of the researcher, aspects were identified as important which may not have been as easily identified by someone who did not have her practical experience. This means that the significance of the pre-POCA 2002 law and 'review documents' were immediately apparent and led to the analysis of the review documents in chapter 2 of this thesis. It also meant that she could see the relevance of the charging order provisions in the pre-POCA 2002 legislation which have been reviewed in chapter 4 and compared with the powers of the magistrates' court to apply for charging orders in chapter 7. As her starting point was the powers of enforcement available to the

[86] For wider consideration of insider research, see Robert K Merton, 'Insiders and Outsiders: A Chapter in the Sociology of Knowledge' (1972) 78(1) American Journal of Sociology 9; Justine Mercer, 'The challenges of insider research in educational institutions: wielding a double-edged sword and resolving delicate dilemmas' (2007) 33(1) Oxford Review of Education 1; Sonia Corbin Dwyer and Jennifer Buckle, 'The Space Between: On Being an Insider-Outsider in Qualitative Research' (2009) 8(1) Int J Qual Methods 54.

magistrates' court, it led to the desire to find an alternative to restraint, rather than to recommend improvements to restraint, as other researchers have done.[87]

Insider research is where a researcher studies themselves, or communities of which they are a member.[88] It has been widely used in many contexts, for example when conducting interviews or in ethnographic research. Here, though, the research author is in a somewhat different position in that she has conducted doctrinal and critical research and has not researched her own community. Despite the different methodology there have been similarities. Like Earle, the research author could not avoid reflecting on her personal experience as a qualitative researcher.[89] As such her experience has become an instrument in the research[90] which has allowed her to reflect on the issues with her own viewpoint where relevant, even on issues she was not previously aware of before her research began. This practical experience does not make her a better or worse researcher, just different[91] and although there is no 'exclusive access to such understanding', she has valuable additional resources in the strength of perspective at her disposal.[92]

The initial purely objective standpoint attempted in this thesis constrained the research, and the use of insider research allows the author's voice to be heard. There have been previous authors who have attempted to 'push the boundaries of what it means to "give

[87] For example, Bullock and others (n 29).
[88] Valli Kalei Kanuha, '"Being" Native versus "Going Native": Conducting Social Work Research as an Insider' (2000) 45(5) Social Work 439; Sue Wilkinson and Celia Kitzinger, 'Representing Our Own Experience: Issues in "Insider" Research' (2013) 37(2) Psychol Women Q 251.
[89] Earle could not avoid reflecting on his time as a prisoner when he returned to prison environments as a qualitative researcher. Rod Earle, 'Insider and Out: Making Sense of a Prison Experience and a Research Experience' (2014), 20(4) QI 429, 432.
[90] Kim V L England, 'Getting Personal: Reflexivity, Positionality and Feminist Research' (1994) 46(1) Professional Geographer 80, 84.
[91] Corbin Dwyer and Buckle, (n 86), 56.
[92] Paul Hodkinson, ''Insider Research' in the Study of Youth Cultures' (2005) 8(2) Journal of Youth Studies 131, 142.

voice" in academic work'[93] and a move away from limiting what counts as 'voice'.[94] This research adds to the use of voice in academic research.

1.6.3 Legal Positivism

This thesis does not attempt to add to the debate about legal positivism about which much has been written. For a number of reasons this thesis has adopted principles of legal positivism, particularly those outlined by Hart.[95]

Despite criticisms of legal positivism,[96] it is an established theoretical background and has been accepted as a theoretical basis for doctrinal analysis.[97] It is therefore the appropriate theoretical background for this research in which legal positivism is defined as being concerned with the study of legal rules, principles, or concepts in relation to the enforcement of confiscation orders,[98] especially given the broad definition of rule adopted here.[99]

Although Hart's views have been criticised, his *The Concept of Law* has been described as one of the most important books on jurisprudence.[100] He explains that the study or analysis of legal concepts (or rules) is important in itself[101] and describes the rule of recognition, or the criteria for identifying the law, as including legislation and judicial

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[93] See Justin Piché, Bob Gaucher, and Kevin Walby, 'Facilitating Prisoner Ethnography: An Alternative Approach to "Doing Prison Research Differently"' (2014) 20(4) QI 449, 450. Followed in Shoshana Pollack and Tiina Eldridge, 'Complicity and Redemption: Beyond the Insider/Outsider Research Dichotomy' (2015) 42(2) Social Justice 132, 133.

[94] Alecia Y Jackson and Lisa A Mazzei, (eds), *Voice in Qualitative Inquiry Challenging conventional, interpretive, and critical conceptions in qualitative research* (Routledge 2009).

[95] HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press, 2012).

[96] Ronald Dworkin has been described as 'Positivism's most significant critic' Leslie Green, 'Legal Positivism', *The Stanford Encyclopedia of Philosophy* (Spring 2018 Edition), Edward N. Zalta (ed) section 3, <https://plato.stanford.edu/archives/spr2018/entries/legal-positivism/> accessed 18.02.2018. See for example Ronald Dworkin, *Law's Empire* (Hart 1986).

[97] See for example, Twining (n 74) 155; Salter and Mason (n 82) 48.

[98] Hart's description of criminal law is of rules which are either obeyed or disobeyed and individuals are said to 'break' the law; with punishment or 'sanction' for breaching the law, Hart, (n 95) 27.

[99] Twining (n 74).

[100] Jules Coleman, (ed), *Hart's Postscript: Essays on the Postscript to the 'Concept of Law'* (Oxford University Press 2001) v.

[101] Hart (n 95) see for example, chapter I and Postscript 242.

precedent; explaining that they are ranked so that the common law is subordinate to legislation.[102] His legal positivism does not require the separability of law and morality,[103] he explains that there may be a connection between laws and morality, although there is no necessity for there to be a connection.[104]

Hart was not of the view that legal positivism meant rules based in legislation only. He described the 'characteristic technique' of criminal law is to have rules (legislation) to set the standards for society to comply with without the aid of individuals to interpret them; and then only when the law is broken do officials identify the breach and impose the sanction (case law)[105] and he has been credited with beginning the rehabilitation of the judicial role in legal positivism.[106] In acknowledging the role of the judiciary to interpret statutes and precedents, he explains that judges are not confined to arbitrary or mechanical choices but display judicial virtues and are often guided by an assumption that the purpose of the rules they are interpreting is reasonable, so the rules are not intended to be unjust or offend moral principles.[107] However, positivists do not claim that the rule of recognition instructs how to interpret cases, but acknowledge that many considerations are taken into account including moral, political, economic, linguistic and logical considerations.[108] Hart explains that a descriptive legal theorist may understand and describe the internal view but not necessarily agree with it so rejecting any criticism of the descriptive theory.[109]

For these reasons Hart's legal positivism has been adopted as the theoretical background to examine the rules in relation to the enforcement of confiscation orders in the magistrates' court, the use of restraint orders and charging orders. These rules include

[102] ibid 100-101.
[103] Green explains that any idea that there must be separability is mistaken. Green (n 96) section 4.2.
[104] Hart (n 95) 185-186.
[105] ibid 38-39.
[106] Jeremy Horder, 'Criminal Law and Legal Positivism' (2002) 8 LEG 221, 238.
[107] Hart (n 95) 204-205.
[108] Green (n 96) section 3.
[109] Hart (n 95) 242-243.

the legislation and case law. They include the reasons why the introduction of the confiscation legislation and further amendment was necessary, and the way the judiciary have interpreted those rules. But this research also uses the term 'rule' in its broadest sense by including the analysis of the review documents to explain the rules and identify the issues.[110]

[110] Twining (n 74) 174-175; text to n 74.

Chapter 2 The Use of the Review Documents

2.1 Introduction

This chapter analyses documents referred to in this thesis as 'review documents' and forms the basis of one of the areas of critical analysis undertaken. The documents have been included because of their relevance to this research and give a complete picture of the regime since the introduction of the DTOA 1986, although some consider the wider asset recovery regime rather than just confiscation.[111] They include official documents as well as government strategies, either those which see confiscation as a tool in its armour, for example drugs strategies and serious crime strategies; or are government strategies directly reviewing confiscation orders at their heart. Other review documents concern the use of confiscation orders by government agencies, or are documents published by bodies which hold the government to account and there is a category of research carried out by academics to assess various aspects of the regime. Some of the review documents therefore require more careful analysis than others, especially if they have been written specifically to review the effectiveness of the enforcement of confiscation orders; or have reviewed the legislation at the time and led to changes to the legislation.[112]

This thesis concentrates on those parts of the review documents relevant to this research and some of the documents are more relevant than others. Those that specifically review the efficacy of the confiscation regime provide more detail directly relevant to the recommendations made. Others provide the background information to show how government policy in relation to the confiscation regime has changed.[113] Documents which provide statistical analysis of the regime have also been included although some of the statistics or information reviewed relate to the wider asset recovery powers. Although statistics are useful to show the importance of the confiscation regime, and in explaining

[111] The fact that asset recovery is wider than confiscation has been identified King and Walker (n 11).
[112] A complete list of the review documents considered in this chapter is shown in Appendix 2.
[113] Other commentaries have also been included where relevant to this thesis.

how previous conclusions have been reached, to some extent the number of confiscation orders and restraint orders are of secondary importance to this research. For example, although the fact that a certain number of restraint orders have been made in any given year may be worthy of note, what is important to this research is the nature of restraint, the fact that there is a reluctance to apply for the orders[114] and the conclusions in this thesis that alternatives are needed.

This approach is justified for a number of reasons. There is a lack of previous literature about the enforcement of confiscation orders, including the powers of the magistrates' court,[115] and some of the review documents include details about the enforcement powers of the magistrates' court. They are a rich source of information and some have the advantage of including data gathered from interviewing members of the various criminal justice agencies involved in the regime. They begin to examine the themes which are developed in later chapters and show a pattern of issues which began with the DTOA 1986. This will also explain how the law has changed and will add to the context of that development explaining in some detail how the issues and changes to the legislation have arisen before examining them and to what extent they still exist. Finally, the review documents support the recommendations for amendments to the payment order provisions, and the introduction of confiscation charging orders as a power of the Crown Court, to address some of the issues raised and meet the need to improve the enforcement of confiscation orders in the magistrates' court.

By adopting this methodology an analysis of policies and issues over more than 30 years has been undertaken. This is not just of historical interest and allows a wider perspective than individual review documents have allowed. It also shows where the issues in relation to the enforcement of confiscation orders in the magistrates' court have figured in the regime and that issues with enforcement can begin with the imposition of the confiscation order or earlier investigation. This coupled with the rules that exist in the regime analysed

[114] n 937, n 943-n 950 in chapter 4.
[115] n 47-n 57 in chapter 1.

in later chapters[116] provide a bigger picture view of enforcement which will be of interest to lawyers, policy makers, criminal justice agencies and legislators.

There are markers in time identified by the reports. The PIU report[117] contained accepted government policy and led directly to POCA 2002. A consequence is that subsequent reviews have started with that report. It is argued that any review of the regime should also include reviews and issues for the enforcement of confiscation orders in the magistrates' court identified before the PIU report. The second marker in time is the NAO Report[118] which led to other reviews in this chapter and has also been identified as leading to 'a fundamental shake-up' in enforcement.[119] However, the chronological review shows that the government had already identified a need to improve the enforcement of confiscation orders as improvements were planned in the 2013 Serious and Organised Crime Strategy.[120]

The confiscation regime began as a result of the decision in *Cuthbertson*[121] when the House of Lords held that the MDA 1971 could not be used to confiscate the proceeds of drugs offences. As will be shown in later chapters the confiscation legislation has been amended many times since imposition of the DTOA 1986.[122] The Hodgson Report[123] led directly to the creation of that Act and that report has been analysed in the next chapter. Since the introduction of the confiscation order regime the decisions in two cases have led directly to a change in legislation. Because of *R v Dickens*[124] there was a change in the burden of proof when imposing a confiscation order in the pre-POCA 2002 legislation; and

[116] Chapter 4 considers the rules in relation to restraint, chapter 5 the confiscation based powers of the magistrates' court, with the fines based powers analysed in chapters 6 and 7.
[117] Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (Cabinet Office 2000) ('PIU Report').
[118] NAO Report (n 71).
[119] Wood, Enforcing Criminal Confiscation Orders (n 2) 2.
[120] 2013 Serious and Organised Crime Strategy (n 62) 34-36.
[121] *Cuthbertson* (n 5). This is considered in more detail in chapter 3 n 600-n 608.
[122] n 619-n 649 in chapter 3.
[123] *The Profits of Crime and Their Recovery: Report of a Committee chaired by Sir Derek Hodgson* (Heinemann 1984) ('Hodgson Report').
[124] [1990] EWCA Crim 4, [1990] 2 QB 102.

because of *R v Waya*[125] a change to section 6 of POCA 2002 was introduced enshrining the consideration of proportionality when imposing a confiscation order. However, the majority of the legislative changes in the confiscation regime have come about because of research and concerns raised in government papers including various drug strategies and criminal justice strategy plans.

2.2 1989-1998: The DTOA 1986 to the Home Office Working Group Third Report

The Home Office Working Group on Confiscation produced three reports. It was set up in 1990 to review, amongst other things, the operation of the existing legislation to restrain and confiscate the proceeds of crime and identify areas of law which required amendment, including proposals if it found there was a need for urgent primary legislation. The remit included a need to take into account the needs of practitioners and the key role of confiscation orders to the government strategy to 'fight …drug trafficking and other serious crime'.[126] The Working Party was made up of representatives of Agencies including the Home Office, the Association of Chief Police Officers and the Crown Prosecution Service, and by the Third Report included a member of the Justices' Clerks Society.[127] Of particular relevance to this research it was able to consider the difficulties experienced by the magistrates' court by considering statistics and considering the responses to a questionnaire sent to justices' clerks responsible for court areas dealing with confiscation orders.[128]

The Home Office Working Group came about in part because of issues raised in a Home Affairs Committee Report ('HAC Seventh Report').[129] The Home Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and

[125] [2012] UKSC 51, [2013] 1 AC 294.
[126] Home Office, *Working Group on Confiscation Third Report: Criminal Assets* (1998) ('Working Group Third Report') Annex A.
[127] ibid Annex B. This means the views of magistrates' courts were taken into account through the justices' clerks.
[128] ibid para 2.1.
[129] Home Affairs Committee, *Seventh Report Drug Trafficking and Related Serious Crime* (HC 1988-89, 370 I) ('HAC Seventh Report').

policy of the Home Office and its associated public bodies.[130] The HAC Seventh Report accepted that the problems that had emerged with the DTOA 1986 might be teething problems[131] and found that there was a consensus among those who had given evidence that overall the 1986 Act had been a success.[132] However, it identified issues with the apparent lack of communication between the parties and recommended the setting up of the Working Group.[133] It also concluded that improvements could be made to the powers of restraint to allow applications to be made to District Registries of the High Court.[134] There were no figures available about the amount of monies recovered against the approximately £11 million of confiscation orders made between January 1987 and May 1989, but the Committee accepted that there were shortfalls.[135] It also recommended that the DTOA 1986 should be amended to cover interest or appreciation in value after a confiscation order was made.[136] This is the first review document to suggest improvements to restraint and the Report's concerns about the lack of statistics, and shortfalls in collections, along with the need for parties to work together, are still relevant today.

The Home Office Working Group was duly established. The First Report was published in May 1991[137] and it also reviewed the DTOA 1986, concluding that it should concentrate initially on those areas which might require legislative change. Although the confiscation provisions of the Criminal Justice Act 1988 were in force, the Group did not report on the effectiveness of that Act until their second report in 1992.[138] Both reports made recommendations for improvements to the confiscation system and led to amendments of the DTOA 1986 and the CJA 1988 and the enactment of the DTA 1994. In addition, the

[130] See for example the HAC 2016 Report (n 26).
[131] HAC Seventh Report (n 129) xx.
[132] ibid xvi.
[133] ibid xx.
[134] ibid xviii.
[135] ibid xviii.
[136] ibid xix.
[137] Home Office, *Working Group on Confiscation Report on the Drug Trafficking Offences Act 1986* (1991) ('Working Group First Report').
[138] Home Office, *Working Group on Confiscation Report on Part VI of the Criminal Justice Act 1988* (1992) ('Working Group Second Report').

recommendations in the second report led to the changes in POCA 1995 which brought the confiscation provisions in the CJA 1998 more in line with the DTA 1994. Whereas the first two reports considered improvements to the legislation, the third report published in 1998 undertook a more radical view. It considered the extension of the regime to non-criminal confiscation and the establishing of a national agency.[139]

As would be expected the First Report considered issues outside the focus of this thesis including the fact that in practice courts had difficulty in interpreting the conditions for making confiscation orders, and the confiscation hearing was more time-consuming than expected.[140] The report echoed the recommendations of the HAC Seventh Report and recommended that confiscation orders should be capable of variation upwards[141] but there were no recommendations in relation to the accrual of interest. It also noted that members of the judiciary had expressed concerns about the inability to inquire into the interests of third parties at the Crown Court but did not come to any firm conclusions.[142]

Directly relevant to the main recommendations in this thesis, issues were identified with the enforcement of confiscation orders which were contained in their own chapter in the report. This began a history of detailed reviews of some of the difficulties in the enforcement of confiscation orders and it outlined the fact that the order was passed to the magistrates' court to be enforced as a fine which causes problems. Collection rates were relatively low and the report identified that justices' clerks were not finding it easy to enforce confiscation orders. It found that initial efforts, including getting the defendant to pay voluntarily was time-consuming and unsuccessful and that the magistrates' court had encountered difficulties in obtaining the necessary information to locate and take action

[139] Working Group Third Report (n 126) para 1.3.
[140] It also reviewed the decision of the Court of Appeal in *Dickens* (n 124) when it was held that the prosecution should meet the criminal standard of proof in satisfying the court of the matters to be determined in making a confiscation order, even if the assumptions were applied, Working Group First Report (n 137) 3. In chapter 5 of the Report miscellaneous recommendations were made in relation to the regime.
[141] Working Group First Report ibid 11.
[142] Ibid 6-7.

against the defendant's assets.[143] It described the process for the magistrates' court applying for enforcement in the county court as 'a tortuous process' which resulted in a reluctance by justices' clerks to apply.[144] Closer contact between the justices' clerks and a receiver was also identified as a need.[145]

As a result, there were proposals that the Crown Court should become more involved in the enforcement process by stating at the time of making the confiscation order the method by which the order would be enforced. It suggested three options should be available to the Crown Court. The first would be an order directed at any person holding money belonging to the defendant and sent from the Crown Court to the magistrates' court to be enforced, similar to a garnishee order. The second method would be directed to any person in possession of the defendant's goods in a similar way to a distress warrant and again the magistrates' court would be informed. The third method of enforcement would involve authorising the prosecutor to apply for the immediate appointment of a receiver in relation to realisable property as soon as the appeal period has expired.[146]

The First Report concluded that the provisions of the Act were still relatively new but that they were central to the government crime strategy and it was therefore vital that any defects were identified and rectified at the first opportunity.[147] However, it took until POCA 2002 for the legislation to allow for a payment order to be made which gives the magistrates' court power to make a payment order for money in a bank account. It is suggested that those powers, even though subsequently amended, do not go far enough and require further amendment.[148] The tortuous process described for the designated officer who has to apply for enforcement in the county court or High Court still exists as

[143] Ibid 8.
[144] Ibid 8.
[145] Ibid 8.
[146] Ibid 8-9.
[147] ibid 1.
[148] These powers are examined in chapter 5, text to n 1099-n 1112.

shown when considering the power for the designated officer for the magistrates' court to apply for a third party debt order[149] or charging order.[150]

There were other proposals. It was proposed that a receiver should be able to apply for a downward variation of a confiscation order if there is a shortfall after the realisation of assets;[151] that serving the term in default should not expunge the debt; and that the existing link between the default periods for fine and confiscation orders should be broken.[152] These changes were eventually made[153] although breaking the link in the default periods was not achieved until the amendments to POCA 2002 by the SCA 2015.[154]

When the Home Office Working Group Second Report was written recommendations from the First Report to amend the DTOA 1986 were being taken forward in the Criminal Justice Bill.[155] The Report concluded that the differences in the drugs and general crime provisions meant that the CJA 1988 was difficult to apply in practice, noting that only four confiscation orders were made under the CJA 1988.[156] Recommendations were made to align the confiscation order provisions of the CJA 1988 in some way with those of the DTOA 1986 as it was intended to be amended. Even at that stage there was disagreement amongst members of the Working Group. Some felt there should be full alignment with DTOA 1986 as amended, others argued that drug trafficking is almost invariably a lifestyle offence, and that although the crimes in the category of Part VI of the CJA 1988 might be considered as reprehensible as drug trafficking, others might be

[149] As shown in chapter 5, text to n 1113-n 1139.
[150] As shown in chapter 7, text to n 1432-n 1452.
[151] Working Group First Report (n 137) 9.
[152] ibid 10.
[153] The changes to the default terms expunging the debt are explained in chapter 3, text to n 610-n 637. The powers of variation are considered in chapter 5, text to n 1161.
[154] Text to n 1189-n 1194 in chapter 5.
[155] Working Group Second Report (n 138) 6. These include the Group's recommendation to be able to defer or postpone the making of a confiscation order for six months, or longer in exceptional circumstances, and in the meantime sentence the offender, ibid 16. Criminal Justice HL Bill (1986-87) 15.
[156] ibid 2.

thought insufficiently grave to attract the full weight of the confiscation arrangements appropriate to drug trafficking.[157]

It sought views about whether the regimes should be fully aligned but recommended that the £10,000 limit in the CJA 1988, which must exist before a confiscation order could be made, should be abolished. The Working Group felt this would meet the problem of calculating benefits in cases where defendants were charged jointly. They also felt the logic of the proposition is that which lies at the heart of the confiscation scheme itself: that crime should not pay and a criminal should not benefit from their crimes, a principle which applies whatever the amount of benefit.[158]

The Working Group discussed whether the service of a term of imprisonment in default for a confiscation order under the CJA 1988 should expunge the liability to pay, but felt it was a sensitive issue and did not make any recommendation.[159] It noted a 'marked increase' in the amounts of confiscation orders realised, putting that down to the need for the courts and prosecutors to familiarise themselves to the procedures and the increasing use of receivers, and that some of the changes recommended in the First Report had been included in the Criminal Justice Bill.[160] As a result it concluded that the recommendation in the First Report that orders similar to a garnishee order or distress warrant should be available to the Crown Court would no longer be required.[161] Given the continued recommendations for improvement, the assessment that powers were sufficient was premature and there are still concerns about collection rates. Similarly, the fact that POCA 2002 introduced the power for the magistrates' court to make a payment order shows that there was an ongoing need for an order similar to a garnishee order.

[157] ibid 6-7.
[158] ibid 8.
[159] ibid 17-18.
[160] ibid 17. The changes commented on were that serving the default term should not expunge the debt and that the existing link between fines and confiscation order defaulters should be broken for confiscation orders made under the DTOA 1986.
[161] Working Group Second Report (n 138) 17.

Before the Working Group Third Report two documents were published in 1995. An academic review of the confiscation regime was commissioned by the Home Office Police Research Group and Levi and Osofsky reviewed the law relating to the investigation, seizing and confiscating the proceeds of crime.[162] It was timely as the DTOA 1986 and the CJA 1988 had been in force for some time, amendments had been introduced by the CJA 1993, and the DTA 1994 had recently been enacted. Their report outlined the history of the confiscation legislation; it also considered the imposition of orders, which is outside the scope of this thesis.

The Foreword to the Levi and Osofsky paper by I M Burns, the Deputy Under Secretary of State for the Home Office Police Department acknowledged that the authors had identified factors that prevented the effective use of the legislation but anticipated that the new legislation would assist in this regard. He also noted that they had made practical suggestions for improvement in this area of law.[163]

The objectives of the research included a review of the effectiveness of the legislation on the tackling of organised crime, in particular drug related organised crime. In addition, it considered whether any improvements could be made by changing police strategies or from changes to the legislation, but also reviewed good practice.[164] The research was undertaken using interview and observational techniques and examining case files[165] and issues with the enforcement of confiscation orders were considered. The report reviewed the enforcement of orders by the use of charging orders, restraint orders and receivers.[166]

A proposal was made to remove the enforcement of confiscation orders from the magistrates' court and leave enforcement to the police who would be properly funded.[167] This is the only time that a proposal to remove enforcement from the magistrates' court

[162] Michael Levi and Lisa Osofsky, *Investigating, seizing and confiscating the proceeds of crime* (Police Research Group Crime Detection and Prevention Series Paper 61, Home Office 1995).
[163] ibid iii.
[164] Ibid 1-2.
[165] ibid 2. Staff from magistrates' courts were interviewed.
[166] ibid 18-22.
[167] ibid 59.

has been made, however, in doing so it reviewed some of the difficulties experienced by the magistrates' court. The recommendation was based on a number of factors, the perceived need for a 'cradle to grave' approach[168] and a call by some police officers to confiscate assets alongside the 'in personam' nature of confiscation;[169] and their conclusion that there is little incentive for prosecutors and the courts to spend money on enforcing confiscation orders unless the amounts recovered are likely to exceed the costs of enforcement.[170] Arguably the need to confiscate assets has now been met in part by the changes to POCA 2002 made by the Policing and Crime Act 2009 which allows some assets to be seized and sold to satisfy a confiscation order.[171] In fact HMCTS and the magistrates' court is responsible for enforcing all orders regardless of the amount outstanding, although it is accepted that cases may be prioritised.[172] However, there is still a need for an improvement in the enforcement of confiscation orders, and the need for a 'cradle to grave' approach has been emphasised by later review documents.[173] The recommendations in this thesis to give the Crown Court powers to make more orders on imposition would go some way to meet these needs.

Levi and Osofsky concluded that no-one who reviewed the confiscation regime 'would judge it a success'.[174] This is at odds with the findings of other reports. The HAC Seventh report considered the DTOA 1986 a success, basing its conclusion on evidence from the Home Office, the Association of Chief Police Officers and HM Customs and Excise,[175] although it did highlight issues with restraint. Similarly the Working Group Second Report reported an increase in collections and concluded that some of the additional enforcement

[168] Ibid 59.
[169] ibid 28.
[170] Ibid vii.
[171] Text to n 953-n 958 in chapter 4.
[172] MOJ and HMCTS, Written evidence to the HAC 2016 (n 26) para 22. Text to n 537-n 538 in chapter 3. This is within the knowledge of the research author.
[173] Rick Brown and others, *The Contribution of Financial Investigation to Tackling Organised Crime: A Qualitative Study* (Home Office, 2012) 13; Wood, The Big Payback (n 5) 14. Similarly, a need for an 'end-to-end' approach has been identified, *Payback Time: Joint Review of Asset Recovery Since the Proceeds of Crime Act 2002* (2004) ('Payback Time') 81.
[174] Levi and Osofsky (n 162) vi.
[175] HAC Seventh Report (n 129) xvi.

powers recommended in the First Report were no longer required which shows why its participants felt at that stage that the CJA 1988 was working, albeit that improvements in appointing receivers were needed.[176] This chapter shows that other improvements were needed as well.

The second publication in 1995 was HAC Organised Crime Report which commended the extension of the regime to other serious crime[177] which is unlikely if it considered the regime a failure. The review documents show that the reality was somewhere between the two divergent views. It seems harsh of Levi and Osofsky to conclude that the regime was not a success, but there were clearly issues with it. Improvements were being made to the regime, and this chapter shows that even to this day more are needed. It also shows the need for a more balanced debate of the regime which was still being called for in 2016.[178]

As well as welcoming the extension of the drugs confiscation provisions to other serious crime the HAC Organised Crime Report recommended that the legislation should be kept under review by the Home Office Working Group on Confiscation.[179] It identified that if the proceeds of crime are confiscated, crime becomes less attractive,[180] but concluded that the recovery of amounts ordered to be confiscated was still an issue and recommended that a full study should be carried out on the reasons for low collection rates, which were still being seen as the means of measuring success. The reasons given by the Home Office relevant to this thesis were that there is a significant time lag between imposition and recovery, unrealistic orders due to the overvaluation of property, and the fact that the amounts received were net of receivers' costs, although there were no figures available for the HAC to consider.[181]

[176] Working Group Second Report (n 138) 17.
[177] HAC Organised Crime Report (n 63) xlviii.
[178] Wood, Enforcing Criminal Confiscation Orders (n 2) 4.
[179] HAC Organised Crime Report (n 63) xlviii.
[180] ibid xli.
[181] ibid xlix.

In 1998, which is the same year as the third and final Working Group Report, the government's ten-year drug strategy was published. It lamented the lack of success in realising substantial assets from confiscation orders for drug related activity and asserted that the strategy would increase confiscation orders and their collection.[182] This shows the importance of the effective enforcement of confiscation orders to the government strategy for dealing with drugs offences, which is confirmed by later strategies dealing with drug crime.

When the Working Group Third Report was published it looked at the confiscation regime more widely than previous Working Group Reports and addressed the enforcement of confiscation orders, which it saw as a key issue.[183] It had a large chapter on enforcement including the powers of the magistrates' court and so is relevant to this thesis, not least because a number of the issues have not been addressed. It identified that the annual return of collection rates does not give the whole picture accepting the anecdotal evidence that receivers' costs could be considerable,[184] and there could be a shortfall in the value of assets when they are realised.[185] It acknowledged the issues caused by third parties,[186] and the importance of agencies working together.[187]

This was an influential report in the development of the legislation as it was followed by the PIU report which in turn led to the introduction of POCA 2002. Some of the recommendations have been introduced, for example it recommended the use of a form for the Crown Court to complete listing the assets identified at the confiscation hearing, to assist the magistrates' court with enforcement.[188] Recommendations were made to

[182] HM Government, *Tackling Drugs to Build a Better Britain: The Government's Ten-Year Strategy for Tackling Drugs Misuse* (CM 3945, 1998).
[183] Working Group Third Report (n 126) para 1.4.
[184] ibid para 2.5.
[185] ibid para 2.7.
[186] ibid para 2.7.
[187] ibid paras 2.28-2.32.
[188] ibid paras 2.10-2.14. Although a form has been introduced more can be done, text to n 748 in chapter 5.

reduce the time allowed to pay a confiscation order[189] which POCA 2002 did.[190] Although changes have been made, they have not solved all the problems in the regime.

After reviewing the problems being experienced by the magistrates' court, recommendations were made about the powers of the justices' clerk to make applications to the High Court and county court;[191] and about cash seized from the defendant, a recommendation which became a payment order in POCA 2002.[192] The Report also recommended that the magistrates' court should be able to apply to the Crown Court for a review of the amount to be paid under a confiscation order that was obviously unenforceable and be able to apply to remit confiscation orders in the case of fluctuations in exchange rates where the offender was subsequently deported.[193] These powers were introduced in POCA 2002 and further amended in the SCA 2015 and CFA 2017.[194]

There was criticism of the Third Report as its approach 'sometimes ignores the broader picture'; and the figures could have been more useful if there had been more detail, for example, how many restraint orders were made.[195] However, it is a useful report and its findings are still applicable today despite the passing of time. It specifically considered the difficulties experienced by magistrates' courts enforcing confiscation orders making specific recommendations for improvement. It also provides support for the recommendations in this thesis for the Crown Court to make payment orders[196] and charging orders.[197] Finally it led to some of the recommendations in the PIU Report, which is the next report to be considered in this chapter and in turn led to POCA 2002.

[189] Ibid paras 2.15-2.17.
[190] POCA 2002, s 11. The time for payment provisions have been amended by the SCA 2015, text to n 1034-n 1039 in chapter 5.
[191] Working Group Third Report (n 126) paras 2.33-2.37.
[192] ibid paras 2.38-2.39.
[193] Working Group Third Report (n 126) paras 2.40-2.44.
[194] Text to n 1148-n 1152 in chapter 5.
[195] P D Brunning, 'Home Office Working Group on Confiscation: Third Report' (1999) 163 JPN 466, 467.
[196] Working Group Third Report (n 126) paras 2.32-2.36.
[197] ibid para 2.37.

2.3 PIU to POCA 2002

The PIU Report was published in June 2000 after a nine month study and reviewed the history of the legislation relating to the pre-POCA 2002 legislation. It considered that its findings complemented the recommendations in the Home Office Working Group Third Report namely that the Crown Court judge should identify assets taken into account when the confiscation order is made, that orders should be paid forthwith, and enforcement powers should be strengthened.[198]

The report included a comprehensive review of the confiscation law at that stage, but not in relation to the fines based powers of enforcement in the magistrates' court. It concluded that the magistrates' court held the most powers for enforcing confiscation orders, but was not best equipped to deal with the enforcement of confiscation orders made against more serious criminals because the enforcement powers are designed to deal with 'modest fines' and it is 'ill-equipped' to collect assets from more serious criminals.[199] Despite this, there were limited recommendations for changes to the enforcement powers of the magistrates' court which it is argued was a missed opportunity. Up until this point the enforcement powers of the magistrates' court had been a focus of reports and the PIU report marks the start of a focus on restraint as the enforcement power needing improvement, and a lack of focus on the difficulties experienced in the magistrates' court. However, as it led directly to POCA 2002 it is a vital piece of research and led to major changes in the confiscation regime.

The purpose of the PIU report was to look at wider asset recovery, but also covered the confiscation provisions in detail and concluded that making confiscation orders should become 'the norm'.[200] Echoing the purpose of the legislation the report found that most crime is motivated by profit and that the recovery of the proceeds of crime can reinforce

[198] PIU Report (n 117) 73.
[199] ibid 42.
[200] Ibid 63-66.

messages relevant to this thesis namely that crime does not pay, and removes the funding from further criminality.[201]

The report represented agreed government policy and found that the UK powers to confiscate criminal assets were clear and wide-ranging but there were anomalies in the scheme as it had developed in a piecemeal fashion.[202] It criticised the collection rate and felt it was failing to deliver the attempted attack on the proceeds of crime.[203] At the time of the report, collection rates were running at an average of 40% or less despite the fact that the value of the confiscation order has been set taking into account the defendant's realisable property or 'ability to pay'. The report examined the reasons for the shortfall concluding that orders are sometimes made in an amount that is higher than the realisable amount although it concluded that at that stage it was less common. It also identified hidden assets as an issue affecting collection rates along with attempts by defendants to obstruct restraint and confiscation orders by methods which include damaging property.[204]

It concluded that the system of confiscation was complex with the High Court, Crown Court and magistrates' court involved.[205] This had already been acknowledged by the Home Office in 1997 when it said:

> with so much legislation in such a short space of time it would be surprising if more than a few practitioners were fully aware of everything that can be done… to confiscate the proceeds of crime. An overview of the whole field, taking in confiscation … is much-needed.[206]

An example of how confusing it had become is that confiscation orders could be made in certain circumstances in the magistrates' court, the Crown Court and the High Court, with

[201] ibid 5.
[202] ibid 5, 7, 26, 63 and 64.
[203] ibid 30-31.
[204] ibid 70.
[205] ibid 7.
[206] Home Office Guide (n 4) v.

enforcement in the High Court and the magistrates' court and applications for restraint and charging orders made to the High Court.

To address the problem of low collection rates, the PIU report recommended a number of changes in the legislation relevant to this thesis. It recommended a single piece of legislation to provide an opportunity to create a uniform confiscation regime which would close any loopholes and make it easier to use and understand.[207] This would be achieved by extending the provisions that apply to drug trafficking confiscation to all types of offence, encouraging training, and extending the time limit for making confiscation orders.[208] Specific recommendations to improve the enforcement of confiscation orders were made, namely allowing courts to transfer the ownership of restrained assets to the State to pay towards the confiscation order, including bank accounts,[209] allowing management receivers to deal with assets as necessary, seeking increased use of sanctions to enforce orders, and allowing Crown Courts to make restraint orders.[210] It made recommendations for charging orders to continue but to become a power of the Crown Court alongside restraint orders.[211]

The PIU report has been described as a 'significant milestone' in relation to the development of the contemporary regime,[212] which is undoubtedly correct as the legislation which followed means amongst other things that all the powers in relation to confiscation, whether drugs offences or general crime are governed by the same rules, and that all associated orders are heard at the Crown Court. However, it is submitted that it also represented a missed opportunity and this report starts a focus on the power of restraint rather than the fines based powers of the magistrates' court, and a focus on orders made under POCA 2002. This means that there has been little consideration of the fines based powers of the magistrates' court and the difficulties it experiences using

[207] PIU Report (n 117) 66.
[208] ibid 63.
[209] ibid 71.
[210] ibid 63.
[211] ibid 69.
[212] Bullock and Lister (n 33) 52.

those powers to enforce both POCA 2002 and pre-POCA confiscation orders, a situation which this thesis seeks to address.

The recommendations in the PIU report led directly to the Proceeds of Crime Bill.[213] As noted, the Proceeds of Crime Bill: Publication of Draft Clauses described the changes as creating a 'one stop shop' in the Crown Court in relation to confiscation[214] building on the recommendations in the PIU report to make a change so that all hearings in relation to confiscation orders would be heard in the Crown Court including applications for restraint orders and charging orders.[215] This is directly relevant to this thesis which considers to what extent a one stop shop has been achieved. Also important to this research is the proposal to abolish charging orders in the Publication of Draft Clauses,[216] and it is suggested that this was another missed opportunity, this time to give the Crown Court an alternative to restraint which could actively assist the magistrates' court where the defendant has an asset which is a house.[217]

The House of Commons Library issued a Research Paper on the Proceeds of Crime Bill[218] which summarised the existing law and the proposals for change in the Proceeds of Crime Bill which were wider than just confiscation. By the time of the Research Paper, the clauses published in the Proceeds of Crime Bill: Publication of Draft Clauses had been updated and no longer contained clauses for charging orders to be made in relation to confiscation orders.

[213] Proceeds of Crime HC Bill (2001-02) [31].
[214] Text to n 31 in chapter 1.
[215] And applications to vary and discharge confiscation orders.
[216] *Proceeds of Crime Bill: Publication of Draft Clauses* (n 31) para 2.13.
[217] The powers of the High Court to make charging orders under the pre-POCA 2002 legislation is considered in chapter 4, text to n 825-n 835.
[218] House of Commons Library Research Paper 01/79*, Proceeds of Crime Bill: Bill 31 of 2001-2002* (2001). These research papers are compiled for the benefit of Members of Parliament and their staff.

The Proceeds of Crime Bill[219] was highlighted by the government in its criminal justice strategy in 2001, Criminal Justice: The Way Ahead,[220] which saw the Bill as strengthening the confiscation and restraint provisions to support the government's strategy to tackle general and drug related crime and modernise the criminal justice system.[221] This built on previous strategies and although it did not consider the proposals in any detail, later reports made more detailed recommendations for change. The Updated Drug Strategy in 2002 also welcomed the Proceeds of Crime Bill as a way of strengthening the confiscation regime,[222] and shows the importance of confiscation to the strategy to take assets of those who have committed drugs and other offences.

The PIU report and the Bill also led to the establishing of an Asset Recovery Strategy and Committee[223] although the PIU report made recommendations for the law in England and Wales and the strategy related to the law in the United Kingdom. The strategy followed many of the recommendations in the PIU report and set targets for the improvement of the recovery of the proceeds of crime. Targets continued for some time but were subsequently removed[224] and the government's position was updated in later strategies considered in this chapter.

2.4 2004-2010: POCA 2002 The Early Years

The confiscation provisions of POCA 2002 came into force on 24th March 2003. The Review documents published post POCA 2002 show that the Act did not solve all the problems of the confiscation regime and there have been further amendments to the legislation and calls for further changes. Government strategies have discussed the

[219] Proceeds of Crime HC Bill (2001-02) [31].
[220] Secretary of State for the Home Department, *Criminal Justice: The Way Ahead* (CM 5074, 2001).
[221] ibid 98.
[222] *Updated Drug Strategy 2002* (HM Government 2002) 26, 35.
[223] Home Office, 'Proceeds of Crime Act Asset Recovery Strategy & Committee' (*Home Office,* 31 July 2003) <https://webarchive.nationalarchives.gov.uk/20030731053835/http://www.homeoffice.gov.uk:80/crimpol/oic/proceeds/asset.html> accessed 9 June 2010 ('Asset Recovery Strategy').
[224] *Local to Global: Reducing the Risk from Organised Crime* (HM Government 2011) ('Local to Global') 20.

importance of asset recovery including confiscation to their aims. Initially these were split between drugs offences and other offences, however, there has been a move towards strategies focused on serious and organised crime. The reality is that any changes to confiscation orders made as a result of the strategies apply equally to all confiscation orders, whether in relation to serious and organised criminals or not, and so are relevant to this thesis.

This chapter shows that the government has seen the asset recovery laws as a key part of its criminal justice strategy to cut crime and deliver justice. The first 'Cutting Crime' strategy published a year after POCA 2002 was introduced showed the importance to the government of asset recovery to ensure that crime doesn't pay[225] and explained that the assets recovered had doubled in the past year showing the success of the 'stringent' new provisions of the Act.[226]

The One Step Ahead strategy paper published in 2004[227] was aimed at tackling organised crime and acknowledged the difficulties in measuring enforcement success[228] but was positive about the POCA 2002, reporting that it was already providing a 'robust framework for dealing with criminal assets.'[229] This is despite issues being raised in the same year by a joint inspectorate report, Payback Time,[230] which was the first Inspectorate Report to provide information about the workings of the courts dealing with confiscation orders. This report by the HM Chief Inspector of Constabulary, HM Chief Inspector of the Crown Prosecution Service and HM Chief Inspector of the Magistrates' Courts Service reviewed the asset recovery provisions of POCA 2002 including confiscation since its inception with a review of the legislative history and the PIU report. It concentrated on the operation of

[225] Secretary of State for the Home Department and Secretary of State for Constitutional Affairs and the Attorney General, *Cutting Crime, Delivering Justice A Strategic Plan for Criminal Justice 2004-2008* (CM 6288, 2004) 42.
[226] ibid 38.
[227] Secretary of State for the Home Department, *One Step Ahead A 21st Century Strategy to Defeat Organised Crime* (CM 6167, 2004) ('One Step Ahead').
[228] Which in this strategy was seen as the absence of crime, ibid 54.
[229] ibid 40.
[230] Payback Time (n 173).

the Act but did not make any recommendations for legislative reform which is not surprising as it was published only a year after POCA 2002 came into force.

There was some positive feedback in the report about the amounts collected but it found the enforcement of confiscation orders was 'tinged with some disappointment'[231] and made recommendations for improvement in a number of areas. It identified issues with assessing performance because of the lack of collated statistics by the criminal justice agencies[232] and the confusion caused by dealing with confiscation cases in POCA and pre-POCA cases.[233] It recommended efficient systems to ensure that POCA data can be collected and collated to support JARD and manage local performance[234] explaining that it is difficult to reconcile confiscation orders made and amounts recovered because of the time delays between the order being made and payment.[235] It also recommended that criminal justice agencies work more closely together to improve confiscation enforcement,[236] which it noted was primarily the responsibility of the magistrates' court.[237] Like Levi and Osofsky it identified a need for end-to-end working by the agencies for successful enforcement[238] however unlike that review it recognised positive steps in this area.[239] In fact it noted that specialist magistrates' courts teams were starting to be established[240] and recommended that good practice should be shared.[241]

Having identified some reasons for optimism the Chief Inspectors thought it might be considered 'churlish' to criticise the implementation of POCA 2002 as the legislation was still new, but felt the issues were so important 'that a warning bell needs to be sounded.'[242]

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[231] ibid 9.
[232] ibid 35-40.
[233] ibid 8.
[234] ibid 40.
[235] ibid 48.
[236] ibid 10-13.
[237] ibid 81.
[238] ibid 81.
[239] ibid 81-82.
[240] ibid 82. These became the RCUs.
[241] ibid 52, 82. See for example the recommendation that the Home Office National Best Practice Guide to Confiscation Order Enforcement should be used.
[242] ibid 12, 101.

The concerns run counter to the positivity in One Step Ahead, however the Inspectorate Report focuses on the difficulties in the operation of the framework rather than the framework itself which could explain the difference.

The next review document published in 2007 highlighted similar problems. The Asset Recovery Action Plan was in fact a Home Office consultation to seek views on the proposals in it to build on what it saw as the major successes of POCA 2002 in asset recovery including confiscation.[243] Despite reference to the successes in the Act, the Asset Recovery Action Plan acknowledged that the biggest problem was with the enforcement of confiscation orders and identified areas where improvements could be made.[244]

The successes identified in the Action Plan included agencies working together to improve enforcement, shorter time to pay and tougher sanctions for non-payment, and greater powers to restrain assets.[245] It saw the introduction of the HMCTS Centres of Excellence as a positive move which would help with agencies working together and acknowledged the difficulties for magistrates' courts but did not recommend any changes to the legislation to improve enforcement powers. However, it saw working together and the use of a task force to clear a backlog of confiscation orders made under the pre-POCA 2002 legislation as sufficient to improve the enforcement of orders.[246]

Although the Action Plan reported that the government had delivered an almost fivefold increase in asset recovery performance in five years it aimed to reach £250 million (for all asset recovery) by 2009-2010.[247] To achieve this the government identified that changes were needed to improve confiscation order enforcement using the co-operation between criminal justice agencies, and with the use of increased powers of restraint.[248] It also

[243] *Asset Recovery Action Plan: A Consultation Document* (Home Office 2007) ('Asset Recovery Action Plan') 8.
[244] ibid 16-19.
[245] ibid 10.
[246] ibid 16-19.
[247] ibid 8.
[248] ibid 17-19.

recommended a power to allow law enforcement agencies to sell high value goods especially when the assets are already in the possession of the authorities which would save the expense of a receiver.[249]

There was nothing specific about adding to the enforcement powers of the magistrates' court in the Action Plan, perhaps because it again looked at the operation of the legislation rather than reviewing the provisions of the Act. However, it is an example of the difficulties of magistrates' courts being acknowledged in a post PIU report.

The Plan identified a greater emphasis on targets[250] but by 2011 the government felt that the asset recovery targets were unhelpful and had removed them.[251] The Plan identified that measuring performance is complex and it is difficult to measure the value of orders collected against the value imposed.[252] It stated that receipts to the exchequer should not be the sole sign of success. The government was also keen for other improvements to ensure that defendants are deprived of their gain, including getting their assets restrained, or seized if overseas, and that recovery actions should be recognised.[253]

The second 'Cutting Crime' strategy noted the aim of the government to double performance in asset recovery by 2009-2010 in order to use its deterrent effect to address serious and organised crime.[254] It was followed later in the year by another strategy aimed at cutting crime and delivering justice in 2007,[255] and it included the need for a robust asset recovery system, including confiscation and restraint, to take the profit out of crime and reduce harm.[256] It reported the setting up of centres of excellence by HMCTS to

[249] Asset Recovery Action Plan (n 243) 24-25.
[250] ibid 11.
[251] *Local to Global* (n 224) 20.
[252] Asset Recovery Action Plan (n 243) 18-19.
[253] ibid 10.
[254] *Cutting Crime A New Partnership 2008-2011* (Home Office 2007) 27.
[255] The Secretary of State for the Home Department, The Lord Chancellor and Secretary of State for Justice, and The Attorney General *Working Together to Cut Crime and Deliver Justice A Strategic Plan for 2008-2011* (CM 7247, 2007).
[256] ibid 8, 21, 29.

support better enforcement of confiscation orders[257] and saw efficiencies in the system being achieved through the use of targets for each criminal justice agency.[258]

The 2008 Drug Strategy[259] gave a commitment to improve confiscation by implementing the recommendations in the Asset Recovery Action Plan. It too commented on the proposals to improve POCA 2002 to allow high-value goods to be seized at the time of arrest to prevent assets being removed, seeing the powers as key to better law enforcement.[260]

These powers to seize assets to prevent them being hidden or disposed of before a confiscation order is made were announced in the follow up to the 2008-11 Cutting Crime Strategy[261] which reported the recovery of more than £500 million since the introduction of POCA 2002 although this includes all asset recovery, not just confiscation orders.[262] The provisions of the Policing and Crime Act 2009 which legislated for the change did not come into force until 2015 when POCA 2002 was amended by that Act.[263] These powers allow the magistrates' court to order detention and the sale of certain goods, but do not tie in with the idea of having a one stop shop at the Crown Court, nor do they apply to houses or cash in bank accounts and so do not address all of the issues with restraint orders.

In Extending Our Reach: A Comprehensive Approach to Tackling Serious Organised Crime ('Extending Our Reach'),[264] the government identified the successes since the importance of tackling the finances of serious organised crime was identified in One Step Ahead, and also highlighted the importance of agencies working together. The increased use of restraint at the start of an investigation was an aim.[265] Again the figure of

[257] ibid 30. These became the Regional Confiscation Units (RCUs).
[258] ibid 16-18.
[259] *Drugs: Protecting Families and Communities The 2008 Drug Strategy* (HM Government 2008).
[260] ibid 18.
[261] *Cutting Crime Two Years On An Update to the 2008-11 Crime Strategy* (HM Government 2009)
[262] ibid 32.
[263] Text to n 953-n 958 in chapter 4.
[264] Secretary of State for the Home Department, *Extending Our Reach: A Comprehensive Approach to Tackling Serious Organised Crime* (CM 7665, 2009).
[265] ibid 36.

recovering more than £500 million of criminal assets using POCA 2002 was quoted to show the success of the legislation.[266] As in other strategies, the figures quoted applied to all asset recovery, not just confiscation but it was seen as part of 'a strong record of success'.[267] Recommendations for improvement included proposals to ensure that criminals have to account for assets such as houses.[268] Whilst this was in relation to the use of civil powers of recovery in POCA 2002, it is a principle that supports the recommendations in this thesis.

Further Home Office research was undertaken in 2009, this time into the operation of POCA 2002. Bullock et al's research was commissioned to examine the attrition in confiscation orders, which was defined as the amount lost during different stages of the confiscation process, from the initial police assessment of the criminal benefit, through to the amount eventually recovered from the defendant.[269] This was done by examining information from the period 2006/2007 on JARD, an examination of 155 specific confiscation orders, and interviews.[270] The interviewees included financial investigators, prosecution and defence counsel, judiciary and HMCTS enforcement staff[271] who were asked about issues including the enforcement of confiscation orders and how the process could be improved.[272]

The research and interviews concentrated on attrition from the time the benefit was first assessed to payment. The report included a number of issues relevant to the enforcement of confiscation orders, and to this thesis which considers the attrition between the making of the order and payment. The research considered the operation of POCA 2002 and reported that there is no extensive body of research in the UK on asset recovery but that common difficulties had been identified. The difficulties relevant to this

[266] ibid 54.
[267] Ibid 54.
[268] ibid 57.
[269] Bullock and others (n 29) 3.
[270] ibid 4-6.
[271] ibid 6.
[272] ibid 6-7.

thesis included the limited use of restraint orders, defendants and their representatives negotiating down the value of confiscation orders, and problems in the enforcement of confiscation orders.[273]

It concluded that the landscape had changed since Levi and Osofsky's report and there had been an increase in the amount recovered.[274] However, it found that more could be done. As a result it made recommendations about enforcement including the importance of agencies working together.[275] Like other research before 2016, there was no detailed review of the enforcement powers of the magistrates' court, although it commented favourably on the HMCTS Centres of Excellence[276] and highlighted some of the issues which impact on the enforcement powers of the magistrates' court including the fact that defendants cannot be forced to sell particular assets.[277] However, the review of restraint orders is particularly relevant for this thesis.

The 2010 Drug Strategy[278] highlighted the importance of asset recovery to disrupt criminal finances and reported that in the previous two years over £90 million had been confiscated from drug traffickers. According to the strategy more could be done to enforce confiscation orders but there were no discussions about the powers of the magistrates' court.[279]

Also published in 2010, the Joint Thematic Review[280] is the second Inspectorate report considered in this chapter. This time the criminal justice agencies included were the CPS,

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[273] ibid 3.
[274] ibid 23.
[275] ibid 24.
[276] ibid 18.
[277] ibid 20.
[278] *The Drug Strategy 2010 Reducing Demand, Restricting Supply, Building Recovery: Supporting People to Build a Drug Free Life* (HM Government 2010).
[279] ibid 16. The strategy was reviewed in 2012 in *The Drug Strategy 2010 Reducing demand, restricting supply, building recovery: supporting people to build a drug free life Annual Review – May 2012* (HM Government 2012). It repeated the commitment to ensuring that crime does not pay but made no specific reference to confiscation.
[280] Joint Thematic Review (n 2). The Inspection was carried out by Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI), Her Majesty's Inspectorate of Court Administration (HMICA) and Her Majesty's Inspectorate of Constabulary (HMIC).

HMCTS, Her Majesty's Revenue and Customs (HMRC) and Revenue and Customs Prosecutions Office (RCPO). The report looked critically at the way criminal justice agencies handled asset recovery from investigation to enforcement, as there had been no detailed analysis of that work.[281] Four criminal justice areas were visited, chosen by characteristics thought to make them representative, including size, location and performance, and the fact that they all had an HMCTS Regional Confiscation Unit (RCU).[282] Eighty cases were reviewed although not all of these involved confiscation and key working hypotheses were established by interviewing the main agencies in advance of the review of the frontline work. As such the Inspectors felt they had covered enough ground to test their hypotheses, even though it was not a full national picture.[283] The report included the history of the legislation and concentrated on the effectiveness of POCA 2002 including confiscation orders and much of the report fell outside the scope of this thesis. However, the involvement of all the criminal justice agencies including HMCTS means it provides an analysis of the workings of restraint and the enforcement processes in the magistrates' court directly relevant to this thesis.

It called for a debate on whether cost effectiveness or confidence and other benefits of confiscation should determine whether applications are pursued[284] and the authors suspected that the public confidence in the criminal justice system is based on an assumption that it represents value for money. It found that value for money was not the sole driver for restraint and confiscation, concluding that it would not be right for enforcement agencies to hold back from 'appropriate action' because they believed they would not recover their costs.[285] The report also concluded that resources removed from defendants who had flaunted wealth can boost public confidence.[286]

[281] ibid 1.
[282] ibid 55. RCUs have been referred to in previous review documents as centres of excellence.
[283] ibid 55.
[284] ibid 53.
[285] ibid 52.
[286] ibid 53.

Its initial conclusion was that the restraint and confiscation regime is at least partially effective.[287] However, it found delays in applying for restraint caused problems with enforcement later and that more effective use of restraint would increase the amount recovered significantly.[288] It noted a lack of use of charging orders by HMCTS to enforce confiscation orders with cost identified as an issue.[289] The findings in this report are still relevant today. Some of the later review documents have focused on value for money,[290] an approach which has been criticised,[291] and there is still a debate on the purpose of confiscation orders and what counts as success.[292] There are still issues with restraint, and the issues with charging order applications remain.[293] This Inspectorate report concentrates on how the agencies operate, yet even with its different emphasis it reported similar issues and made similar recommendations to other review documents.

2.5 2011-2014: Home Office Research and other Strategies

The rationale of the organised crime strategy, Local to Global[294] was not about confiscation orders, and there was no detailed review of the POCA 2002, however it is useful as it shows the continued view of the government that it considered the confiscation provisions of POCA 2002 as 'formidable'.[295] It also maintained its position that the enforcement of orders had to improve, reporting that it takes on average 22 months to enforce a confiscation order and even longer in high value cases[296] and undertook to remove blockages in the process by, for instance, denying criminals access to their

[287] ibid 9.
[288] ibid 8.
[289] ibid 44.
[290] For example, the NAO and PAC Reports.
[291] Wood, Enforcing Criminal Confiscation Orders (n 2) 3; text to n 395.
[292] Text to n 567 in chapter 3.
[293] These are analysed in chapters 4 and 7 respectively.
[294] Local to Global (n 224)
[295] ibid 19.
[296] ibid 19.

assets.[297] Its themes were built on in the 2013 Serious and Organised Crime Strategy which started the path towards the changes in the SCA 2015.[298]

However, before then research conducted by Brown et al was published by the Home Office in 2012.[299] Its focus was the use of financial investigation techniques in organised crime and it concentrated on the operation of POCA 2002 including the wider asset recovery provisions as well as confiscation. It is relevant to this thesis as it discusses the uses of POCA 2002 to disrupt organised crime and covers restraint[300] and the enforcement of confiscation orders including the use of charging orders.[301] The research was based on semi-structured interviews with people involved in the investigation and prosecution of 60 organised crime cases and included interviews with investigators and member of the CPS[302] but not HMCTS.

When reporting on the effectiveness of confiscation it reported difficulties in the powers of the magistrates' court to enforce a confiscation order after the default sentence had been imposed.[303] This is another review which highlights the importance of agencies working together and having those involved in the enforcement of confiscation orders involved from the start [304] echoing Levi and Osofsky's findings by calling for a 'cradle to grave' approach.[305] The methodology used gives a good representation of the views of the prosecutors and financial investigators about the enforcement of orders, including the powers of the magistrates' court and as such adds weight to the recommendations in this thesis about the use of charging orders.

[297] ibid 20.
[298] 2013 Organised Crime Strategy (n 62)
[299] Brown and others (n 173).
[300] Ibid 10-12.
[301] Ibid 12-14.
[302] ibid iii, 3.
[303] ibid 13.
[304] ibid 13.
[305] Ibid 59.

Local to Global was followed in 2013 by the Serious and Organised Crime Strategy[306] but the government's thinking had developed since 2011.[307] Its aim was 'to substantially reduce the level of organised crime affecting the UK and the level of serious crime that requires a national response'[308] and led to the changes to POCA 2002 introduced by the SCA 2015. Four areas were identified, prosecuting and disrupting people engaged in serious and organised crime (Pursue); preventing people from engaging in this activity (Prevent); increasing protection against serious and organised crime (Protect); and reducing the impact of this criminality where it takes place (Prepare).[309] The one that is relevant to this thesis is 'Pursue' which includes preventing the use of the proceeds of crime.[310]

Like previous strategies the Serious and Organised Crime Strategy highlighted the positive use of POCA 2002, in this case to pursue criminals by recovering over £150 million each year and denying access to £500 million in 2012/2013[311] through confiscation orders, the civil recovery of cash and through taxation powers, the latter two falling outside the scope of this thesis. Again it identified the need to improve asset recovery which included a need to ensure that court orders are enforced,[312] explaining that powers are only as effective as their enforcement.[313] It explained that disruption is key to the strategy[314] and identified that co-operation between the agencies was necessary to improve enforcement.[315] Unlike previous strategies it specifically set out legislative changes to POCA 2002 it wanted to introduce and although there were suggested improvements to restraint orders, some of the proposed changes were also aimed at improving the enforcement powers of the magistrates' court. Those relevant to this thesis

[306] 2013 Serious and Organised Crime Strategy (n 62).
[307] ibid 25.
[308] ibid 25.
[309] ibid 7.
[310] ibid 27.
[311] ibid 34.
[312] ibid 34.
[313] ibid 35.
[314] ibid 33.
[315] ibid 35.

are strengthening default terms because it identified that defendants can only serve the default term once and can refuse to pay the confiscation order after release, stronger powers for the restraint of assets, the reduction of the time to pay confiscation orders, an increased ability to apply for a payment order, and introducing travel restrictions after the confiscation order has been made.[316]

The Strategy marked a change in focus on the enforcement of confiscation orders and is the first review since the Working Group Third Report that specifically considered enhancing the legislative powers of enforcement relevant to the magistrates' court and HMCTS, although it only considered the enforcement of orders made under POCA 2002.

The recommendations led to some of the changes to POCA 2002 in the SCA 2015[317] and thus to improvements to the enforcement of confiscation orders in all cases including those led by HMCTS, not just orders made in respect of serious and organised crime. It also shows the importance of confiscation orders to other government strategies. The Serious Crime Bill[318] which led to the Act was seen as a key piece of legislation to improve the confiscation regime in POCA 2002 which would in turn assist the government with its Modern Slavery Strategy[319] and Modern Crime Prevention Strategy.[320] Its recommendations have also been considered in later review documents.

The inclusion of the CPS Asset Recovery Strategy[321] in this chapter is an opportunity to consider the aims of the main prosecuting agency in this area. Its strategy was to improve the enforcement of confiscation orders, supporting the 2013 Serious and Organised Crime Strategy.[322] It saw POCA 2002 as transformational as prior to the Act about £25 million

[316] ibid 35.
[317] Relevant to this thesis, the SCA 2015 amended the powers of the Crown Court to give a discretion when making a confiscation order, the powers to make a compliance order or section 10A determination and order the discharge of an order. It changed the default terms and amended the payment order provisions available to the magistrates' court.
[318] Serious Crime HL Bill (2014-15) 1.
[319] *Modern Slavery Strategy* (H M Government 2014). This led to the Modern Slavery Act 2015 which made changes to POCA 2002. These changes fall outside the scope of this thesis.
[320] *Modern Crime Prevention Strategy* (Home Office 2016).
[321] *CPS Asset Recovery Strategy* (Crown Prosecution Service 2014).
[322] ibid 1.

was recovered in criminal assets, and at the time of writing the figure had risen to over £150 million a year.[323] By the time the CPS Strategy was published, the NAO had published its first report on confiscation orders which is examined in the next section. The Strategy acknowledged the finding in the NAO Report that agencies need to work together to achieve an improvement in asset recovery and saw it as essential to ensuring its success[324] along with the need for a strategy to deal with the appointment of receivers.[325] It is also explained that there is a Service Level agreement with HMCTS and as part of that when the CPS cannot add anything to the enforcement of a confiscation order, it will hand the lead of that enforcement back to HMCTS,[326] which is the experience of the research author.

2.6 2011-2016 NAO and PAC reports

The National Audit Office (NAO) report on Confiscation Orders was printed on 17th December 2013.[327] It is particularly significant because it triggered the Public Accounts Committee and Home Affairs Committee reports and it focused debate on the enforcement of confiscation orders and triggered a further debate about how success should be measured. The National Audit Office Reports and the subsequent Public Accounts Committee Reports, along with the Government Responses have been considered together.

The reports in this section all started from the position that confiscation orders are the main way the government has of depriving defendants of the proceeds of their crime.[328] The role of the NAO includes scrutinising public spending and reporting on whether

[323] ibid 1.
[324] ibid 2-3.
[325] ibid 7.
[326] ibid 6.
[327] The NAO Report (n 71).
[328] ibid 2, 5, 10; Committee of Public Accounts, *Confiscation Orders* (HC 2013-2014, 942) ('PAC Report') 3, 7.

departments and bodies funded by them have used resources 'efficiently, effectively, and with economy.'[329] In the introduction to the 2013 report, the NAO states that:

> Our vision is to help the nation spend wisely. Our public audit perspective helps Parliament hold government to account and improve public services.[330]

This gives an indication into the approach taken in the report which concentrated on POCA 2002. It assessed whether confiscation orders present value for money, and considered the attrition rate. Interviewees included members of HMCTS and the judiciary and visits were made to HMCTS offices which deal with the administration of confiscation orders and so was able to report on the issues which are experienced.[331] It concluded that the amounts confiscated were small and amongst other things considered the enforcement of orders to discover why.[332]

It considered issues and made recommendations outside the scope of this thesis, for example whether more confiscation orders can and should be made but made findings relevant to this research. It lamented the lack of data on the regime which means there is no information about what is collectable, or performance data,[333] nor did it find any agreed success measures.[334] The Report identified a weakness in that HMCTS reports all impositions, receipts and debts in its annual trust statement which means that 'only HM Courts & Tribunals Service is being held accountable for all enforcement activity'[335] even though it has no direct responsibility for the other agencies. Although it reported that HMCTS successfully collects 90 per cent of its orders under £1,000.[336]

[329] ibid introduction.
[330] ibid introduction.
[331] The NAO Report (n 71) 45-46.
[332] ibid 6.
[333] ibid 7.
[334] ibid 8.
[335] ibid 20.
[336] ibid 7.

The report was critical of the confiscation regime and the enforcement of orders and has been described as 'scathing'.[337] Its criticisms included the lack of use of restraint orders noting that there is a link between early action, for example, using a restraint order and successful enforcement which was not being used effectively[338] and it reviewed the use of receivers.[339] It concluded that the main sanctions available to the magistrates' court, namely default sentences and interest, do not work.[340] and considered some of the other powers of enforcement available to the magistrates' court under both POCA 2002 and the pre-POCA 2002 legislation mentioning payment orders, treaties to seize overseas assets, and taking money from the defendant's income or benefits and charging orders.[341] In fact the NAO recommended that other sanctions should be introduced to improve the enforcement of confiscation orders, again specifically mentioning charging orders.[342] The Report was written after the 2013 Serious and Organised Crime Strategy and welcomed the impetus on improving enforcement noting that the Home Office were going to make changes to POCA 2002.[343]

The NAO Report concluded that the confiscation process was not working well enough[344] but this conclusion was based on a value for money test. It has been credited with restarting the focus on the enforcement of confiscation orders,[345] but this chapter shows that it had already begun with the 2013 Serious and Organised Crime Strategy. What can be seen is a clear line from the NAO Report to many of the later reports considered in this chapter, although not all of them analyse the powers of the magistrates' court. It also supports the recommendations in this thesis that whilst early action is important

[337] Wood, Enforcing Criminal Confiscation Orders (n 2) 3.
[338] NAO Report (n 71) 28-29.
[339] ibid 37-39.
[340] ibid 7.
[341] ibid 32.
[342] ibid 32.
[343] ibid 24.
[344] ibid 8.
[345] Wood, The Big Payback (n 5) 14.

alternatives to restraint can be considered including charging orders.[346] However, the focus on value for money has been controversial.

As can be expected the NAO reports include a large amount of information which has been relied upon in other reports including two Public Accounts Committee (PAC) Reports on Confiscation, one in 2014 ('The PAC Report')[347] followed by a progress report in 2016 ('PAC Progress Report').[348] However there were two PAC Reports on the Ministry of Justice Financial Management worthy of mention which pre-dated the NAO Report, one in 2011[349] and the other in 2012[350] which covered all financial management but also included a review of the collection of financial penalties including confiscation orders.

The enforcement of confiscation orders was not the focus of the earlier reports, but there were criticisms of the collection rates of confiscation orders. In 2011 the PAC heard that HMC(T)S was only responsible for 16% or £150 million of the £2 billion of outstanding confiscation orders and their collection rate was around 60% compared to around 40% for other agencies.[351] The PAC thought this could be attributed to the fact that the Service was responsible for lower value confiscation orders which were easier to collect, defined as up to £50,000.[352] It concluded that agencies should work together more closely to improve performance.[353] In 2012, the Committee concluded that there had been a 'dramatic increase' in the amount of confiscation orders outstanding and again identified a need for agencies to work together at a high level to address that[354] but it also heard evidence from the then chief executive of HMC(T)S that it was the most successful agency in the collection of confiscation orders, although he claimed that HMCTS has the

[346] NAO Report (n 71) 32.
[347] PAC Report (n 328).
[348] Committee of Public Accounts, *Confiscation Orders: progress review* (HC 2016-2017, 124) ('PAC Progress Report').
[349] Committee of Public Accounts, *Ministry of Justice Financial Management* (HC 2010-11, 574).
[350] Committee of Public Accounts, *Ministry of Justice Financial Management* (HC 2010-12, 1778).
[351] PAC Report Ministry of Justice Financial Management 2010-2011 (n 349) 12.
[352] ibid 12.
[353] ibid 6.
[354] PAC Report Ministry of Justice Financial Management 2010-12 (n 350) 10.

easy end of the business.[355] It is the experience of the research author that the orders managed are not always easy and HMCTS have to manage all types of orders, not just low value ones, and as this research will show the use of fines based powers adds a complexity to the system which should be addressed. However, it is the 2014 and 2016 Confiscation reports which have been analysed in detail in this thesis.

The Committee of Public Accounts is appointed by the House of Commons to examine:

> the accounts showing the appropriation of the sums granted to Parliament to meet the public expenditure, and of such other accounts laid before Parliament as the Committee may think fit (Standing Order No 148).[356]

It scrutinises value for money but does not look at why public money has been spent or the merits of government policy.[357] The 2013 PAC Report considered the effectiveness of POCA 2002 and its conclusions echo those of the NAO Report that weaknesses hamper its effectiveness. This is not surprising as it relied on the data produced by the NAO and they are both concerned with value for money. On the basis of the NAO report it heard evidence from witnesses from the criminal justice agencies including the then Chief Executive of HMCTS, Peter Handcock.

The PAC was critical of the enforcement of confiscation orders which led to headlines such as 'Criminals choosing jail rather than pay confiscation orders'[358] and 'Criminals profiting due to confiscation 'shambles', say MPs'.[359] In particular the PAC stated that bodies responsible for confiscation work in silos and identified a lack of clarity in stated

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[355] ibid Evidence of Peter Handcock, Ev 13.
[356] 'Public Accounts Committee-Our Role' <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/role/ > accessed 16 May 2016.
[357] ibid.
[358] 'Parliament UK website', <www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/confiscation-orders-report-publication-sub/> accessed 26 March 2014.
[359] Catherine Baksi, 'Criminals profiting due to confiscation 'shambles', say MPs' [2014] Law Soc.Gaz <.https://www.lawgazette.co.uk/practice/criminals-profiting-due-to-confiscation-shambles-say-mps/5040524.article> accessed 26 March 2014.

objectives and success measures.[360] It also noted the reduction in the use of restraint orders[361] and that the government was planning to strengthen the default terms for non-payment of confiscation orders.[362]

It made a number of recommendations relevant to this thesis which were considered in the Government Response.[363] The government agreed with the conclusion and recommendation that 'Not enough is being done to enforce confiscation orders once they have been made, especially in relation to higher value cases' and that agencies should work together to do more to use restraint orders more quickly and report on the enforcement of priority orders.[364] It also agreed with the conclusion that 'The bodies involved with confiscation orders do not have the information they need to manage the system effectively'. It explained that the CPS was working on bespoke performance measures and was considering a cost analysis of some cases, and set a target to improve JARD.[365] Finally, the government agreed that 'The sanctions imposed on offenders for failing to pay confiscation orders do not work' and undertook to strengthen the maximum default term for non-payment of a confiscation order as outlined in the 2013 Serious and Organised Crime Strategy.[366]

There were updates from both the NAO and the PAC in 2016. The NAO Progress Report[367] helpfully compared the recommendations of its earlier report with the recommendations in the PAC Report and assessed whether they had been achieved.[368] The NAO did this by comparing data in its earlier report, conducting interviews, and assessing information held on JARD and the performance reports of agencies. It also

[360] PAC Report (n 328) 7.
[361] ibid 9-10.
[362] ibid 12.
[363] HM Treasury, *Government Responses on the Forty Fifth to the Fifty First and the Fifty Third to the Fifty Fifth reports from the Committee of Public Accounts: Session 2013-14* (CM 8871, 2014).
[364] ibid 22. Recommendation 4. The government explained that priority cases were being identified by agencies and the work would be overseen by the Criminal Finances Board.
[365] ibid 22-23 Conclusion and recommendation 6.
[366] ibid 23 Conclusion and recommendation 7.
[367] National Audit Office, *Confiscation Orders: Progress Review (*HC 2015-16, 886) ('NAO Progress Report').
[368] ibid 46-47.

reviewed the enforcement action on the top 10 priority orders and considered information in HMCTS Trust statements.[369]

The evaluation of progress in the report was mixed, on the one hand the report showed improvements, but on the other it did not find that the regime had been 'transformed' as expected by the PAC,[370] although the PAC did not use that word. It found that the early action, by which it meant the use of restraint was still lacking[371] and that although the criminal justice agencies had made progress in most of the recommendations made by the PAC, it had met only one of them fully, namely to strengthen the sanctions for non-payment of a confiscation order.[372] It concluded more could be done to enforce orders.[373]

A positive finding was the increase in collection rates from 41% in September 2013 to 45% across all orders and a continuation of the increase in collection amounts year on year.[374] The amount outstanding had also increased, however this was due to the accrual of interest.[375] The improvements in enforcement included better co-operation[376] and the identification of priority orders.[377] When considering the changes in the SCA 2015, it found it was too soon to assess the impact of those changes[378] although it reported that the decline in the number of restraint orders made had started to reverse which could possibly be attributed to the changes in the SCA 2015.[379] When discussing the new power for the Crown Court to make determinations of benefit which are binding on third parties, the Report suggested that further legislative changes could be considered to 'redress the balance in favour of the authorities'.[380] The recommendations for legislative changes in

[369] ibid 43-44.
[370] ibid 8, 12, 42.
[371] ibid 10, 30.
[372] ibid 8.
[373] ibid 10.
[374] Ibid 21-22.
[375] ibid 22.
[376] ibid 22-23.
[377] ibid 24.
[378] ibid 24.
[379] Ibid 30.
[380] ibid 30.

this thesis seek to do that in all cases where the asset is cash in a bank account or a house, not just where third parties are involved.

The PAC Progress Report discussed the NAO Progress Report which it noted was 'of interest' to it because of its own report on confiscation orders, and because the Home Affairs Committee had at that stage an open inquiry on criminal assets.[381] The PAC relied on the content of the NAO progress report although it came to its own conclusions.[382] It took evidence from the Home Office, the CPS and the police,[383] but not HMCTS, and was disappointed that more had not been done but acknowledged the complexities of the system.[384]

It considered the six recommendations made by the PAC in 2014 which the Home Office had committed to implement by the end of 2015[385] including improving restraint orders in high value cases, producing better performance information and strengthening the confiscation order sanctions regime. The Committee did not accept that 5 out of the 6 recommendations made by the PAC in its report in 2014 had been achieved.[386] However, it acknowledged that improvements had been made and took written evidence from the Home Office that the amounts collected had increased from £133 million in 2012-13 to £175 million in 2015-16. The amounts outstanding had also increased,[387] and the Committee concluded that more could be done especially in relation to high value orders.[388] This report discussed the purpose of the confiscation regime and the fact that there was a concentration on amounts collected rather than the disruptive effects of confiscation.[389]

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[381] PAC Progress Report (n 348) Oral Evidence Monday 18 April 2016, 1-2. The HAC 2016 Report is considered later in this chapter.
[382] ibid 10.
[383] ibid 8.
[384] ibid Oral Evidence Monday 18 April 2016, 2.
[385] ibid 8.
[386] ibid 3.
[387] ibid 9-10.
[388] ibid 10.
[389] ibid 12-13. It reported that the Home Office regularly cited the amount of income confiscated rather than how much crime had been disrupted.

The parts of the Government Response relevant to this thesis agreed with the PAC recommendations that there is a need to agree the objectives for confiscation orders and what constitutes success, and to develop a measure for the disruptive effect of confiscation.[390] The government also agreed to publish statistics on the collection rates, what cannot be collected and what is being done to improve collection rates.[391] As a result of this recommendation, the Home Office published statistics in 2017 and 2018.[392]

The NAO and PAC Reports along with the Government Responses demonstrate the important need to improve the collection and enforcement of confiscation orders, and the fact that changes were being made. The first NAO report focused very much on value for money, but by the PAC progress report there was already a consideration of disruption as an alternative measure of success. These themes were picked up by the two other review documents published in 2016.

2.7 2016: Wood's Reports and Home Affairs Committee Report

2.7.1 Wood's Reports

Wood authored two reports which were published in 2016,[393] both of which concentrated on the enforcement of confiscation orders. Her reports were published prior to the progress reports by the NAO and PAC but she described the NAO Report of 2013 as 'scathing' of the confiscation regime as a whole including the enforcement of orders.[394]

In both of her reports Wood criticised the emphasis on 'value for money' as a success factor and she wanted to put a 'counter-view' to the 'value for money' focus of the NAO report.[395] In Enforcing Criminal Confiscation Orders she thought that it could be argued

[390] HM Treasury, *Government Responses to the Committee of Public Accounts on the Thirty Seventh and the Thirty Ninth reports from Session 2015-16; and the First to the Thirteenth reports from Session 2016-17* (CM 9351, 2016) 44. Conclusion and recommendation 4.
[391] ibid 43. Conclusion and recommendation 2.
[392] *Asset Recovery Statistical Bulletin 2011/12-2016/17* (n 28). *Asset Recovery Statistical Bulletin 2012/13-2017/18 Statistical Bulletin 18/18* (Home Office 2018).
[393] Enforcing Criminal Confiscation Orders (n 2); The Big Payback (n 5).
[394] Wood, Enforcing Criminal Confiscation Orders (n 2) 3.
[395] ibid 3-4.

that this is an unfair measurement and that a better test would be the impact on the criminal economy and the perceptions of society given the fact that confiscation orders are a criminal justice process. In particular Wood felt that the focus of the NAO report was limited and failed to highlight the disruptive effect of a confiscation order even if the ability to collect was limited, citing the ability of the court to impose a default sentence, and that the NAO report did not explain the difficulties for collection because of the nuanced and complex law.[396]

Similarly, in The Big Payback, Wood felt that the NAO and some media could be criticised for concentrating on 'value for money' and argued that it is an unfair measure of success as it is a criminal justice system and is not commercial.[397] She also raised concerns about the headline figure of £1.6 billion being the amount of confiscation orders outstanding when only £203 million of that could realistically be collected.[398]

Some of Wood's research is of direct relevance to this thesis. In Enforcing Criminal Confiscation Orders the aims and scope of the report were to explain the legislation and the extent to which it can explain the high level of uncollected orders. This was done by reviewing the legislation and literature, considering the statistics available and interviewing current and former practitioners.[399] The report reviewed the history of the legislation including the imposition of confiscation orders and Wood concentrated on the criminal confiscation order regime because of the 'lack of balanced debate in the field'.[400] She specifically considered whether it is the law rather than the administration causing 'the large value of uncollected orders' and to what extent do 'real assets' exist to be used to satisfy the orders.[401] Although a high proportion of outstanding confiscation orders were

[396] ibid 3.
[397] The Big Payback (n 5) 2.
[398] ibid 9, 12.
[399] Wood, Enforcing Criminal Confiscation Orders (n 2) 4.
[400] ibid 4.
[401] ibid iv and 4.

attributed to the unintended consequences of the law, Wood concluded that this did not alone account for the total amount of uncollected orders.[402]

In The Big Payback, she examined the changes to POCA 2002 made in the SCA 2015, and then analysed some of the 'systemic enforcement developments' to assess whether the changes impact on the enforcement process and to evaluate the 'utility and durability' of the changes, building on the analysis in Enforcing Criminal Confiscation Orders.[403] The Big Payback was based on around twenty-five semi-structured interviews with current and former practitioners and found that in considering the drafting of the POCA 2002 the practicalities of enforcing confiscation orders based on the assumptions in the Act were 'at best, an afterthought'.[404] However, Wood concluded that the government had done more with the recent changes to POCA 2002 than any previous government to ensure that the enforcement of confiscation orders is given the priority needed but that those changes should be seen as the start and not an end[405] and made recommendations for further research.[406]

In addition, Wood reviewed domestic co-ordination highlighting the importance of agencies working together and repeated a phrase used in other review documents when calling for a need for a 'cradle-to-grave' approach to confiscation, meaning from investigation to enforcement which had been lacking.[407] She identified improvements made in this area domestically and internationally[408] but it is argued that more remains to be done.

Although there are similarities with this thesis, Wood's focus was different, and it only covered the impact of POCA 2002. However, it covers some of the same ground and

[402] ibid 15.
[403] Wood, The Big Payback (n 5) 2.
[404] ibid 1.
[405] Wood, The Big Payback (n 5) 22.
[406] ibid vii-viii.
[407] ibid 14. See Levi and Osofsky (n 162) 59; Brown and others (n 173) 13.
[408] Wood, The Big Payback ibid 14-16.

provides useful information for this research including restraint,[409] receivers,[410] and the changes made by the SCA 2015.[411] Despite her criticisms of the NAO report, she did recognise that the report had led to a renewed focus on the enforcement of confiscation orders,[412] although the government policy which led to the changes in the SCA 2015 were published in the 2013 Serious and Organised Crime Strategy. This shows that the government had already made plans to try to improve the enforcement of confiscation orders before the spotlight placed on it in the NAO Report of 2013.

One particular question posed by Wood's balanced review of the enforcement process was if prosecutors and Financial Investigators cannot trace and enforce assets 'what chance do HMCTS have with their more limited powers?'[413] This thesis seeks to make recommendations which would give HMCTS more of a chance to enforce these court orders.

2.7.2 Home Affairs Committee Report 2016

The most recent HAC report analysed in detail in this research is the HAC 2016 Report[414] and it examined government policy on POCA 2002 including the changes brought in by the SCA 2015.

The HAC undertook its inquiry because of concerns about the implementation of proceeds of crime provisions initially raised in the NAO report. Also because of what it saw as a lack of progress since then given the fact that the NAO and PAC recommendations had been accepted by the government and their implementation had been promised by 2015. The HAC accepted the NAO Progress Report conclusion that five out of the six

[409] ibid 4-6.
[410] ibid 20-21.
[411] ibid 3-13.
[412] ibid 14.
[413] Wood, Enforcing Criminal Confiscation Orders (n 2) 10.
[414] HAC 2016 Report (n 26).

recommendations had not been met and many of the fundamental weaknesses in the confiscation system remain.[415]

The HAC announced its inquiry on 21 January 2016[416] and invited written representations on a number of areas. Those relevant to this research are:

- Whether additional measures are required to achieve the objective that criminals do not benefit from their crimes.
- The steps needed to improve the performance of agencies.
- What measures are needed to address the lack of awareness of confiscation orders and the associated enforcement process.
- How to address weaknesses in IT systems and data-sharing which hampers effectiveness.
- How to strengthen co-ordination across the agencies including whether one agency should be given lead responsibility.
- How to increase accountability and make performance measures more meaningful.
- Whether further steps including strengthening the sanctions available are needed to improve low collection rates.
- Whether the complexity of the system has implications for the effectiveness of the system and what benefits an increased body of case law may bring.[417]

The HAC published 22 written submissions and heard oral evidence on three different dates.[418] Wood provided written evidence which summarised her reports analysed in this chapter.[419] She also gave oral evidence and the HAC relied on her information to back up

[415] ibid 6.
[416] Home Affairs Committee, 'Proceeds of Crime Inquiry Launched'. <http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news-parliament-2015/160119-proceeds-of-crime/> accessed 16 August 2016.
[417] HAC 2016 Report (n 26) 7.
[418] ibid 7.
[419] Helena Wood, Written Evidence to Home Affairs Committee, *Proceeds of Crime* (HC 2016-2017, 25)

its premise that confiscation orders are ineffective.[420] Amongst others, written evidence was received from the MOJ and HMCTS.[421]

The Committee reviewed the NAO and PAC reports considered earlier in this chapter and quoted the statistics used there. It quoted from the NAO progress report in 2016 that in 2014-2015 1,203 restraint orders were used, the overall enforcement rate was 45% with 96% of orders up to £1000 enforced and 22% of orders over £1 million enforced. It also quoted figures that £1.61 billion was outstanding in September 2015, up from £1.46 billion in September 2013[422] and that interest made up nearly 30% of the outstanding debt at £470 million.[423]

The Committee received evidence on a number of areas. These included the view that action should be taken to protect assets from being hidden and accepted that there was often a concentration on getting a conviction rather than recovering the proceeds of crime.[424] In addition it heard that early restraint and seizure should be adopted rather than it being an afterthought.[425] A further recommendation was made that a performance measure should be whether assets are frozen and ready to be recovered as soon as a confiscation order is made.[426]

The Committee considered the purpose of the regime in detail, considering that the measure of success should include both collection rates and disruption.[427] Echoing the concerns that the PAC and Wood had considered, the HAC concluded that the outstanding debt figure of £1.61 billion is largely artificial and that using uncollectable

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/proceeds-of-crime/written/28764.html> accessed 16 August 2016.

[420] ibid 5-6.

[421] MOJ and HMCTS Written Evidence to the HAC 2016 (n 25).

[422] HAC 2016 Report (n 26).

[423] ibid 3. The figures were taken from the Serious Fraud Office, Written Evidence to Home Affairs Committee, *Proceeds of Crime* (HC 2016-2017, 25) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/proceeds-of-crime/written/29576.html> accessed 16 August 2016.

[424] HAC 2016 Report (n 26) 8-9.

[425] ibid 9-10.

[426] ibid 10.

[427] ibid 26-27.

amounts and interest could be 'unhelpful' and recommended that collection rates should be reported as 'collectable' and uncollectable' debts.[428] However, the report made it clear that this is not a recommendation to 'wipe the slate clean' as judges have determined that the money is owed and should not be written off, and criminals will accrue interest on their 'debt to society' ensuring that crime doesn't pay, but the Committee wanted authorities to concentrate on debt that can be collected.[429] The Committee made recommendations for improving the enforcement of confiscation orders including a greater co-ordination between criminal justice agencies[430] and, like the PAC Progress Report, recommended that the Home Office should publish annual statistics on the wider performance.[431]

The Government Response to the HAC 2016 Report agreed that assets should be frozen as early as possible where it is operationally appropriate to do so.[432] It also agreed that more could be done but outlined the changes it had made to improve the regime with the SCA 2015 and the Criminal Finances Bill[433] which it felt would meet the HAC's recommendations to improve the use of restraint.[434] It also felt that it had made changes to ensure that criminal justice agencies work together more effectively.[435]

The government felt that the fines based provisions of the MCA 1980 gave the magistrates' court sufficient powers to enforce confiscation orders and that the increased default terms brought into force by the SCA 2015 were designed to act as an incentive to payment of the order.[436] It welcomed the finding that the figure for uncollected confiscation orders is 'largely artificial' and undertook to publish annual asset recovery statistics[437] which it began in 2017. Since the government response the fines based

[428] ibid 30.
[429] ibid 30-31.
[430] ibid 32, 36.
[431] ibid 27.
[432] Home Affairs Committee, *Proceeds of Crime: Government Response to the Committee's Fifth Report of Session* (HC 2016-2017, 805) ('Government Response to the HAC 2016 Report') 3.
[433] Criminal Finance HC Bill (2016-17) [75].
[434] Government Response to HAC 2016 Report (n 432) 1-3.
[435] ibid 7-8.
[436] ibid 11.
[437] ibid 12.

powers have come under the scrutiny of the Supreme Court which held that the activation of the default term does not apply to accrued interest and if that is the intention then the legislation should be changed.[438] The Court also identified that the application of these powers to the enforcement of confiscation orders is complex.[439] It is suggested therefore that there is now a reason for the powers to be reviewed.

2.8 2016 and beyond

The 2013 Serious and Organised Crime Strategy continues to be of relevance to later review documents. Further changes to POCA 2002 were introduced in 2017 by the Criminal Finances Act, and the policy background for that along with approval for the SCA 2015 changes were contained in the Action Plan for anti-money laundering and counter terrorist finance.[440] The 2017 Drugs Strategy[441] also reflected on the SCA 2015 and the fact that it met the commitments in the 2013 Strategy. It saw the changes to POCA 2002 strengthening the powers available as helpful to money laundering offences[442] but the changes apply to all confiscation orders. These strategies have not been reviewed in any more detail as their scope fall outside the focus of this thesis, but they show the importance of the 2013 Serious and Organised Crime Strategy to the development of the legislation and provide more evidence of the importance of the confiscation regime to the government.

The National Crime Agency (NCA) strategy followed in 2018 which marked its progress from the 2013 Serious and Organised Crime Strategy.[443] The NCA is a non-governmental department but its Director General is accountable to the Home Secretary and therefore to Parliament.[444] Its strategic priorities are related to organised and serious crime including

[438] *Gibson* (n 12) [23].
[439] *Gibson* (n 12) [8].
[440] *Action Plan for anti-money laundering and counter-terrorist finance* (Home Office and HM Treasury 2016).
[441] *2017 Drug Strategy* (HM Government 2017).
[442] Ibid 21.
[443] *NCA Annual Plan 2018-19* (National Crime Agency 2018) 2.
[444] ibid 19.

its disruption.[445] Unlike other strategies reviewed in this thesis, its plans are not concerned with confiscation or asset recovery directly, however any strategy which impacts on confiscation is relevant not just to those orders imposed for serious and organised crime offences but to all orders. This research shows that there is a move away from the collection of confiscation orders as a measure of success and a need to measure disruption.[446] A menu of tactics[447] designed to support the NCA's disruption strategy shows how disruption could be measured and supports the recommendations made in this thesis.

The menu of tactics was praised in the 2018 Serious and Organised Crime Strategy,[448] not specifically in relation to asset recovery, but more generally as a tool to prevent and disrupt serious and organised crime. The Strategy outlined aims to measure success, using methods to include the numbers and impacts of disruptions and assets seized from serious and organised criminals.[449] The 2018 Strategy measured its progress from the 2013 Serious and Organised Crime Strategy[450] and maintained the '4Ps' as a delivery framework, namely Pursue, Prepare, Protect and Prevent.[451] As in the 2013 Strategy it is the Pursue category which is relevant to this thesis, with asset recovery seen as a tool to disrupt and prevent further illegal activity. It reported improvements since the 2013 strategy including the creation of teams which allow agencies to work together more effectively and improve enforcement,[452] and the SCA 2015 changes with its emphasis on the enforcement of confiscation orders, providing further powers for the courts.[453] It

[445] ibid 8.
[446] in chapter 3, text to n 567.
[447] *Disrupting serious and organised criminals: Menu of tactics* (College of Policing, 2017) < https://whatworks.college.police.uk/Research/Pages/Menu_of_Tactics.aspx> accessed 22 April 2018.
[448] Secretary of State for the Home Department, *Serious and Organised Crime Strategy* (CM 9718, 2018) ('2018 Serious and Organised Crime Strategy') 25.
[449] Ibid 37.
[450] Ibid 3.
[451] Ibid 18.
[452] 2018 Serious and Organised Crime Strategy (n 448).
[453] Ibid 29.

promised an action plan on asset recovery which would support the Law Commission's work to identify reforms to improve the confiscation regime.[454]

Some of the later reviews in this chapter have relied on HMCTS Trust Statement statistics when reporting the amount of confiscation orders collected or outstanding.[455] HMCTS has been producing Trust Statements since 2011[456] and they account for the imposition and collection of financial penalties imposed by the judiciary and the police.[457] The Statements provide background information on the collection of confiscation orders, including the amounts that can be seen as recoverable. They also identify that trying to seize and liquidate assets including houses is a lengthy and costly process which means it can take a long time to collect the debt.[458]

There are challenges when using statistics to assess the success of the enforcement of confiscation orders[459] and this thesis does not seek to rely on a particular set of statistics to support its recommendations, however the Trust Statements have been relied upon for information. Figures have been included in Appendix 1, and the 2017-18 Statement shows that as at 31 March 2018 the total debt estimated to be recoverable was £644 million compared with £556 million in 2016-17. In the period 2017-18 orders amounting to £195 million were made, £14.7 million of which was for orders less than £25,000. Of those lower value orders £10.3 million was collected, a rate of 70%.[460]

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[454] Ibid 30.

[455] For example, the NAO Progress Report compared the Trust Statement figures between 2012-2013 and 2014-2015, NAO Progress Report (n 367) 43. Wood's research uses figures from the 2014-2015 Trust Statement, Wood, Enforcing Criminal Confiscation Orders (n 2); Wood, The Big Payback (n 5).

[456] Trust statements have been produced annually since the first statement, Her Majesty's Courts Service, Her Majesty's Courts Service Trust Statement 2010-2011 (HC 1705, 2011) 3.

[457] HMCTS Trust Statement 2017-18 (n 23) 5.

[458] ibid 12-13.

[459] Text to n 592-n 599 in chapter 3.

[460] HMCTS Trust Statement 2017-18 (n 23) 12. The high value outstanding was linked to the nature of the debt including the fact that orders are made in hidden assets cases, and the fact that interest accrues until the order is paid in full, ibid 13.

2.9 Conclusions of chapter

This thesis considers the issues and analyses the information in the review documents since the PIU Report which led to POCA 2002, and before. It therefore takes a different starting point to the research which has only concentrated on POCA 2002, or the pre-POCA 2002 legislation and complements the analysis of the legislation and case law in later chapters. The review documents show the importance of confiscation orders, and their success, to government strategies and the policy that crime should not pay. They also show that there have been issues with the enforcement of orders since the DTOA 1986 was introduced, some of which still exist.

The magistrates' court has particular issues when enforcing orders because of the piecemeal development of the legislation and the particular characteristics of the confiscation order. There are the added complications of interest and the fact that the default term does not wipe out the debt. However, the limited powers of the magistrates' court have received little detailed attention between the Working Group Reports and Wood's reports and there have been few calls for their improvement.

A lack of use of restraint has been identified as a particular concern and the issues will be analysed further in chapter 4. Reviews have identified the lack of the use of charging orders by the magistrates' court as a particular problem, although the Working Group Reports explain why it is difficult for them to be used in practice.

Wider issues about the nature of confiscation orders, and the difficulties with identifying success criteria and the collation of statistics, also have their part to play. The review documents also show a move away from collection rates as a sole sign of success and the consideration of the disruptive effect the confiscation regime can have as a success factor.[461] All of these issues are analysed in this thesis.

[461] HAC 2016 Report (n 26) 26-27.

By analysing the pre-POCA 2002 review documents, this thesis shows that initially addressing issues experienced by magistrates' courts and justices' clerks using the fines based powers were seen as important. Later review documents have identified the need for the enforcement of confiscation orders to improve but have concentrated on the use of restraint orders. The documents show an agreement amongst the criminal justice agencies, researchers and the government that there should be an increase in the use of restraint orders to ensure that assets cannot be dissipated.

The themes and issues will now be analysed in more detail. The main recommendations in this thesis are for changes so that the Crown Court can make charging orders and payment orders as an alternative to restraint. It will be shown that the changes can achieve the same aims as restraint, but in a more proportionate, less draconian and less costly way. The recommendations have the advantage of fitting in with government policy including the aim of POCA 2002 to create a one stop shop in relation to confiscation, and address the need for an approach which goes from the cradle to the grave to make confiscation order enforcement more effective[462] and 'redress the balance in favour of the authorities'.[463]

[462] Wood, The Big Payback (n 5) 14; Levi and Osofsky (n 162) 59; Brown and others (n 173) 13.
[463] NAO Progress Report (n 367) 30.

Chapter 3 The development of the regime

3.1 Introduction

The criminal process of confiscation has been described as 'cumbersome'[464] and 'complex'[465] and this thesis will show that these descriptions also apply to the enforcement of confiscation orders by the magistrates' court. In part this is because the changes to the regime mean that the magistrates' court is enforcing orders made under different legislative provisions with different enforcement powers.

The judiciary has been called upon to consider the nature of a confiscation order including the policy behind the regime, particularly in the leading case of *May* where in an endnote the Committee recognised the complexity and difficulties in the confiscation order regime and concluded by:

> drawing attention to the current importance of the power to make confiscation orders. In the period April 2007 - February 2008 the courts in England and Wales made 4504 such orders in sums totalling £225.87 million. In recent years the number of orders and the sums confiscated have steadily risen.[466]

They have had to consider the development of the law when making decisions[467] and it is key to understanding the issues which impact on the magistrates' court. It is necessary, therefore, to consider the nature and development of the regime when analysing the

[464] Colin King, 'Civil Forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland' (2014) 34(3) Legal Studies 371, 373.
[465] Peter Alldridge, 'The Limits of Confiscation' [2011] (11) Crim LR 827, 829. Apart from the Joint Thematic Review which considered that the main principles of confiscation and restraint are not complicated (n 2) 8, the other review documents considered them to be complex and this was one of the reasons for the introduction of POCA 2002, PIU Report (n 117) 7. The Home Secretary Jack Straw described the draft Bill as 'large, complex and innovative' in *Proceeds of Crime Bill: Publication of Draft Clauses* (n 31) foreword by Home Secretary.
[466] *May* (n 79) [48].
[467] See for example the leading cases of *May* ibid [7]-[9] and *Waya* (n 125) [3]-[4].

effectiveness of the current enforcement provisions and also to assess whether improvements can be made.

3.2 The nature of the regime

A confiscation order is enforced as a fine but is very different in nature. This section begins to examine the nature of confiscation orders and how this has caused issues with their enforcement including difficulties with assessing the success of the regime.

3.2.1 Misnomer

A confiscation order is a financial order made by the Crown Court even though assets are often identified as part of the confiscation order process. The Hodgson Committee found that there was no accepted terminology for the type of ancillary orders they were looking at, so they used the terms 'forfeiture', 'compensation', 'restitution' and 'confiscation'.[468] The Committee defined confiscation in a way to differentiate it from forfeiture.[469]

As a confiscation order is an order to pay a sum of money, not property[470] it is an order in personam and not in rem, 'the defendant is at liberty to decide to which of his assets he shall resort to effect payment'.[471] The order has understandably been described as a misnomer by the judiciary[472] and commentators.[473]

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[468] Hodgson Report (n 123) 4-5.
[469] ibid 5. The Report defined 'forfeiture' as 'the power of the Court to take property that is immediately connected to the offence' highlighting the fact that there were many specific powers of forfeiture throughout the law and noting that it was such a power that was attempted unsuccessfully in the Operation Julie case, as *Cuthbertson* was known (text to n 602); and 'confiscation' as 'the depriving of an offender of the proceeds or the profits of crime' again noting the courts inability to order confiscation in the Operation Julie case.
[470] Home Office Guide (n 4) 5.
[471] Talbot and Hinton (n 3) 515.
[472] For example, a confiscation order was described as a misnomer in *Re Norris* (n 3) [12]. *May* (n 79) [9]; *Waya* (n 125) [2].
[473] See for example Deepak Singh, 'CRIMINAL LAW- Wages of sin…the Proceeds of Crime Act, designed by the home secretary to 'send shock waves through the criminal community' [1995] (42) LS Gaz 92. Talbot and Hinton explain that 'despite the nomenclature "confiscation order", nothing is confiscated per se' Talbot and Hinton (n 3) 515. As does Martin Hinton, 'Enforcing Confiscation Orders: An Advice to Justices' Clerks' (1992) 156 JPN 259, 259.

In his article on the enforcement of confiscation orders in the magistrates' court, Brunning starts by saying 'Purists will think the title of this article is a misnomer. Confiscation orders represent assets already available to a defendant at the time of his conviction. They are not designed to be enforced but merely collected.'[474] The fact that the defendant's assets are not seized by the State at imposition is an issue which changes to the restraint order regime have not solved[475] and continues to be a problem for the magistrates' court when enforcing confiscation orders.

3.2.2 The draconian nature of the legislation

Another theme has been the description of the regime as draconian. The draconian nature of the legislation has been taken into account by the judiciary in deciding the interpretation of the statues and is relevant to the analysis of the issues in this research, and the recommendations for changes made.

The adjective Draconian[476] is defined as 'of pertaining to, or characteristic of…the severe code of laws said to have been established by [Draco]; rigorous, harsh, severe, cruel.'[477] When the Drug Trafficking Offences Bill[478] (which later became the DTOA 1986) was debated, some Members of the Houses of Parliament were reluctant to enact the legislation which was viewed as draconian.

In the debate in the House of Commons on the Bill, Mr Corbett stated that drug trafficking 'demands draconian action',[479] but as the Parliamentary Under-Secretary of State for the Home Department, Mr David Mellor stated, the government decided against the American

[474] PD Brunning, 'The Enforcement of Confiscation Orders in the Magistrates' Court' (1997) 161 JPN 430, 430.
[475] As there are issues which prevent the use of restraint orders even where the order would be suitable.
[476] It is formed from the adjective draconic and the suffix ian 'Draconian, adj' (*OED Online*, OUP December 2018) <www.oed.com/view/Entry/57378> accessed 29 December 2018.
[477] 'Draconic, adj' (*OED Online*, OUP December 2018) <www.oed.com/view/Entry/57379> accessed 29 December 2018.
[478] Drug Trafficking Offences HC Bill (1985-86) [54].
[479] HC Deb 21 January 1986, vol 90, col 246.

system of civil proceedings because it was draconian and did not fit into the British system.[480]

During the debate in the House of Lords on the Bill, Lord Hooson described the powers of the Bill as 'draconian'.[481] However, Lord Denning said ''I would not call [the Bill] draconian: I do not like that word at all. I would like to call it a strong and determined effort to deal with one of the biggest menaces to our society in our time''[482] Despite the comments of Lord Denning it is generally agreed that the confiscation regime is draconian,[483] a view confirmed by commentators.[484] The Joint Committee on the Draft Modern Slavery Bill described the confiscation provisions of POCA 2002 as 'draconian'[485] and Wood acknowledged the draconian nature of the regime in her review of the enforcement of confiscation orders.[486]

This nature of the legislation has not just been taken into account on imposition, but also when interpreting the law after a confiscation order has been made. Therefore, it has been accepted that confiscation orders and the measures to enforce them are draconian[487] but the court has to keep a sense of justice and proportion when administering the scheme to ensure that the defendant is not punished for a second time.[488]

When deciding the interpretation of interest on the period to be served in default for non-payment, judiciary found it 'convenient to recall' that the legislation is draconian[489] and judges must take into account the draconian consequences of the order when exercising

[480] HC Deb 21 January 1986, vol 90, col 278.
[481] HL Deb 04 March 1986, vol 472, col 109.
[482] HL Deb 04 March 1986, vol 472, cols 111-112.
[483] Alldridge, 'The Limits of Confiscation' (n 465) 829.
[484] For example, Bullock and Lister who discuss the draconian nature of the regime, Bullock and Lister (n 33).
[485] Joint Committee on the Draft Modern Slavery Bill, *Draft Modern Slavery Bill* (2013-14, HL 166, HC 1019) 93.
[486] Wood Enforcing Criminal Confiscation Orders (n 2) 7, 14.
[487] *Escobar v DPP* [2008] EWHC 422 (Admin), [2009] 1 WLR 64.
[488] *Glaves v CPS* [2011] EWCA Civ 69, [2011] 4 Costs L.R. 556 [56].
[489] *R (on the application of Gibson v Secretary of State for Justice* [2015] EWCA Civ 1148; [2017] 1 WLR 1115 [39].

their discretion whether to make a restraint or receivership order.[490] It is therefore unsurprising that the adjective has been used to describe the legislation concerning restraint as draconian.[491]

It is the view of this thesis that despite the pejorative connotations of the term draconian, the aim of the legislation was to be severe but not excessively so. There are balances in the regime and in practice the judiciary have interpreted the legislation to ensure that it is not excessively harsh or severe. For example, it was noted in *Escobar* that although the enforcement provisions are draconian, the case was not being put on the basis that a draconian construction must be imposed where a less draconian construction would meet the legislative purpose equally well.[492]

Although the judiciary have taken into account the draconian nature of the legislation when interpreting the confiscation legislation[493] it has also held that the draconian nature should not be applied indiscriminately.[494] In *Waya* it was held that the draconian nature cannot be used to abandon the traditional rule that a penal statute should be construed with 'some strictness'.[495] Care has also been taken to ensure that the regime does not violate the defendant's human rights. As a result, the statute must be interpreted in a fair, purposive way giving effect to the legislative policy.[496] Further examples of this balance are highlighted in this thesis as they arise, and it is suggested that whilst the regime can be harsh, where a recommendation for a change in legislation can be made which is less draconian, this should be available to the courts.

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[490] *Windsor v CPS* [2011] EWCA Crim 143, [2011] 1 WLR 1519 [59]-[60].
[491] For example, Stephen Gentle, Cherie Spinks and Tim Harris, 'Proceeds of Crime 2002: update' [2016] (139) Compliance Officer Bulletin 1, 5.
[492] *Escobar* (n 487) [22].
[493] There are many examples but for an instance of each piece of confiscation legislation see *Dickens* (n 124) [11]; *R v Tivnan* [1998] EWCA Crim 1370, (1999) 1 Cr App R (S) 92; *R v David Cadman Smith* [2001] UKHL 68, [2002] 1WLR 54 [23]; *Agombar v The Queen* [2009] EWCA Crim 903 [6].
[494] *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] 2 WLR 210 [24].
[495] *Waya* (n 125) [8].
[496] ibid [8].

3.2.3 Compliance with the European Convention on Human Rights (ECHR)

The application of the ECHR is one of the balances in the confiscation regime and although there have been some challenges, in the main the regime has been held to be compatible with Convention rights. Even when a confiscation order was found to be a retrospective penalty for the purposes of article 7 the decision did not call into question the overall legitimacy of the regime.[497]

The two rights key to this research are article 6(1) and Article 1 of the First Protocol (A1P1). Article 6 has been identified as one of the most litigated articles of ECHR,[498] it is also one of the articles challenged the most in relation to the enforcement of confiscation orders. Article 6 reads:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to

[497] In *Welch v United Kingdom* [1995] ECHR 4 the applicant complained that the confiscation order made under the DTOA 1986 was a retrospective penalty. There was no disagreement about the retrospective nature of the order, the court had to decide whether a confiscation order is a penalty. The court held unanimously that it was a penalty for the purposes of article 7(1) taking into account elements of the order indicative of a penalty even if they are necessary to the confiscation order. The elements taken into account were the sweeping statutory assumptions in the Act, the fact that the confiscation order was directed to the proceeds involved in drug dealing and was not limited to actual enrichment or profit, the discretion of the trial judge in fixing the amount of the order to take into account the culpability of the accused, and the possibility of imprisonment in lieu of payment by the offender. However, the court stressed that it was only considering the retrospective nature of the regime and that it did not call into question 'in any respect' the power to make a confiscation order as a weapon in the fight against the scourge of drug trafficking.

[498] David Perry and Victoria Ailes, 'Proceeds of Crime and the European Convention on Human rights' [2010] (4) Proceeds of Crime Review: The Journal of Asset Forfeiture and Money Laundering 4, 4.

> the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Bell suggested that it might be supposed that the primary provision affecting defendants in confiscation would be A1P1 rights[499] and the right has been shown to be relevant to both the imposition and enforcement of confiscation orders, although the case law has often considered both A1P1 and article 6. An interference with the defendant's A1P1 rights can be justified although the interference must be necessary and proportionate. Article 1 of the First Protocol reads:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any

[499] Evan Bell, 'The ECHR and the proceeds of crime legislation' [2000] (Oct) Crim LR 783, 783.

way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

In *Phillips v United Kingdom*[500] it was held that article 6(2) had no application to confiscation proceedings as they were part of the sentencing process and did not in themselves amount to a new charge. The purpose of the confiscation procedure is not conviction or acquittal, but to properly assess the amount at which the order is to be fixed which is analogous to the determination of a fine or length of a custodial sentence. In coming to this decision, the court had regard to three criteria, (i) the classification of the proceedings under national law; (ii) the essential nature of those proceedings; and (iii) the type and severity of the penalty that the defendant risked incurring. It also held that article 6(1) and A1P1 applied but that there had been no violation of the defendant's article 6(1) rights, and that any violation of his rights to enjoy his property was not disproportionate, and therefore there was no violation of A1P1.

R v Rezvi[501] and *R v Benjafield*[502] were joint appeals in which the House of Lords held that the CJA 1998 and the DTA 1994 were a proportionate response to the need for effective but fair power to confiscate the proceeds of crime and comply with article 6(1) and A1P1. The main judgment was in *Rezvi* and the court followed the Scottish decision in *Her Majesty's Advocate v McIntosh,*[503] which was heard before *Phillips* and followed in that case. In *McIntosh* it was held that Article 6(2) applied only to persons charged with a criminal offence and although if a confiscation order is imposed, a defendant is faced with imprisonment in default of a financial penalty, he is not charged with another offence and therefore article 6(2) does not apply. *Phillips* was also followed in *Rezvi* and as a result it was held that a confiscation order is a financial penalty with a default term attached which

[500] [2001] ECHR 437.
[501] [2002] UKHL 1, [2002] 1 ALL ER 801.
[502] [2002] UKHL 2, [2003] 1 AC 1099.
[503] [2001] UKPC D1, [2003] 1 AC 1078.

means that the provisions of article 6(2) do not apply and that the interference with a defendant's A1P1 rights is justified.

The previous decisions on compliance with the ECHR were reviewed in some detail in *R v Briggs-Price*.[504] A slightly unusual case, the prosecution sought a confiscation order in respect of a specific offence with which the defendant had not been charged. By a majority decision it was held that for the purposes of Article 6(2) a person against whom an application for a confiscation order was made was not accused of any offence other than the trigger offence of which he had been convicted and therefore Art 6(2) was not engaged. The court also considered the case of *Van Offeren v The Netherlands*[505] in which the Strasbourg court again held that article 6(2) did not apply to a confiscation order because there was no separate charge. Lord Mance commented that none of the Strasbourg authorities to which the House had been referred on article 6(2) involved a Grand Chamber decision and it may be that one day the Grand Chamber will have a look at its application in the context of confiscation orders. However, he did not feel that this would lead to any revision of the basic principles established by *Benjafield, Phillips, Van Offeren* and *Grayson and Barnham*.[506]

Bell explains that A1P1 gives a wide discretionary power to interfere with property to the State[507] but also noted that the court must determine whether a fair balance has been struck between the demands of the general interest of the community and the need to protect an individual's fundamental rights.[508] In *Grayson and Barnham v United Kingdom* it was held following *Phillips* that once the confiscation order had been made properly under Article 6(1) there is no disproportionate violation of the right to peaceful enjoyment of

[504] [2009] UKHL 19, [2009] 1 AC 1026.
[505] Application no 19581/04 (ECHR, 5 July 2005).
[506] *Briggs-Price* (n 504) [135] (Lord Mance).
[507] Bell (n 499) 785.
[508] ibid 783.

possessions under A1P1 in making a defendant pay the order.[509] However, the interference is not unlimited and that there is a proportionality test.[510]

It was not until 2012 with the decision in *Waya*[511] that proportionality was read into POCA 2002 to ensure compliance with the defendant's A1P1 rights when a confiscation order is made, and it was not until the amendments to POCA 2002 brought about by the SCA 2015 that the principle was enshrined in domestic legislation.[512] *Waya* was followed in *Ahmad and Ahmed* where it was held that proportionality applies to both the imposition and the enforcement of confiscation orders and in cases where there is joint benefit it is disproportionate and contrary to A1P1 for the State to take the same amount twice in relation to the same benefit.[513]

Writing in 1999, Stewart noted that there had been very few UK applications to the Strasbourg court in relation to a defendant's A1P1 rights but expected the point to be considered in the domestic courts. His article was about UK law generally not specifically about confiscation but he described A1P1 rights as the balance between the general interests of the community and the protection of the individual's rights.[514] In an article in 2000 Alexander argued that the confiscation legislation at that time did conflict with the ECHR, especially in relation to A1P1 as a confiscation order differed from other types of penalty and he expected challenges suggesting that the confiscation provisions should be amended.[515] However, this article was written before any United Kingdom cases were decided at the European Court of Human Rights, and although that author anticipated a number of challenges at that Court, the number that have been heard may be not as

[509] *Grayson and Barnham v United Kingdom* [2008] ECHR 877.
[510] Alldridge, *Money Laundering Law* (n 39) 115.
[511] *Waya* (n 125).
[512] The SCA 2015 amended POCA 2002, s 6.
[513] *Ahmad and Ahmed* (n 12).
[514] Nicholas Stewart, 'Protection of Property Under the Human Rights Act' (1999) 149(6895) NLJ 1013, 1013.
[515] Richard Alexander, 'Do the UK's Provisions for Confiscation Orders Breach the European Convention on Human Rights?' (2000) 3(4) JMLC 297, 299, 303.

many as anticipated and it has been repeatedly held that the legislation is compliant with the ECHR.

However, Stewart was correct that rights have been considered in the domestic courts and these have impacted on both the imposition and enforcement of confiscation orders. The case law considering the Convention rights at various stages of the enforcement process shows that although the provisions are draconian, individual's rights are protected. As Stewart explains there is a balance between protecting the general interests of the community, in this case the imposition and enforcement of confiscation orders, and the protection of an individual's rights whether the individual is a defendant or a receiver.

It is therefore difficult to argue with Alldridge's view that it is 'beyond argument' that there is no violation of article 6 or A1P1 to confiscate all receipts of crime[516] which has been borne out by the case law. It is also understandable that Lord Steyn described the confiscation legislation as being a 'precise, fair and proportionate response to the important need to protect the public'.[517] However, the State must act in accordance with these rights. Of particular relevance to this research is the application of A1P1 and article 6 to the enforcement of confiscation orders. The reasonable time provisions of Article 6(1) apply to the entirety of the confiscation proceedings as they are akin to the amount of fine or length of a period of imprisonment on a defendant which means that action should be taken promptly to make[518] and enforce an order.[519] This is particularly relevant to this research as it is important that enforcement by the magistrates' court takes place within a reasonable time and there have been a number of challenges on this point.[520]

Article 6(3) also applies to the enforcement of confiscation orders in the magistrates' court and where a defendant was not given sufficient prior notice of an enforcement hearing

[516] Alldridge, 'The Limits of Confiscation' (n 465) 836.
[517] *Rezvi* (n 501) [20].
[518] *Bullen and Soneji v United Kingdom* [2009] ECHR 28.
[519] *Crowther v United Kingdom* [2005] ECHR 45.
[520] This case law is analysed in detail in chapter 6, text to n 1328-n 1373.

and time to prepare his defence, and could not obtain legal advice in a complex case because he was in custody and had been in transit, the refusal of an adjournment by the magistrates' court was held to be a breach of Article 6.[521]

As well as the implications of A1P1 in joint benefit cases,[522] domestic courts have also considered A1P1 rights holding that restraint and receivership are not contrary to A1P1 as there is significant public interest in ensuring criminals do not profit from their crimes and this extends to preventing the dissipation of assets to ensure that a confiscation order is paid.[523] The impact of article 6 and A1P1 in the enforcement of confiscation orders are further considered as they arise, and it is suggested that the recommendations in this thesis are proportionate and comply with the ECHR.

3.3 The purpose of enforcing confiscation orders

As noted, the purpose of the legislation, that it is designed to ensure that crime does not pay, and it is designed to take away the benefit from crime, has been taken into account when deciding that the overall scheme complies with the ECHR. The judiciary have recognised the social policy of the confiscation regime when making decisions, highlighting the purpose of stripping convicted defendants of the proceeds of their crimes.[524]

The purpose of the legislation is important for the judiciary making decisions about the enforcement of confiscation orders. In a case relating to the enforcement of a confiscation order made under the CJA 1988 Dyson LJ acknowledged that the

[521] *R (on the application of Agogo) v North Somerset Magistrates' Court* [2011] EWHC 518 (Admin), [2011] ACD 47.
[522] Ahmad and Ahmed (n 12).
[523] *Hughes v Customs and Excise Commissioners* [2002] EWCA Civ 734; [2003] 1 WLR 177 [52].
[524] In *Re Stannard* [2015] EWHC 1199 (Admin); [2015] Lloyd's Rep FC 420 it was stated that the underlying purpose is to show that crime does not pay by forcing criminals to disgorge the benefit derived from criminal activities, if they can afford to do so [46]. For examples of cases decided on the pre-POCA 2002 legislation and POCA 2002 see for example *Dickens* (n 124) [11] ; *R v Harrow Justices, ex parte DPP* [1991] 1 WLR 395 (QB), (1991) 155 JP 979; *R v Ford* [2008] EWCA Crim 966, [2009] 1 Cr App R (S) 13; *Waya* (n 125) [8]; *R v Elsayed* [2014] EWCA Crim 333, [2014] 1 WLR 3916; *R v Nelson and others* [2009] EWCA Crim 1573; [2010] 1 QB 678; *Bullen and Soneji* (n 518).

interpretation of the legislation cannot be decided in the abstract; any meaning will be coloured by the statutory purpose and the context in which the phrase is used.[525]

The case of *May*[526] makes it clear that the imposition of a confiscation order does not operate in the same way as the imposition of a fine but is a way of depriving defendants of the benefits of their relevant criminal conduct within the limits of their available means.[527] It has also been noted that the purpose of a confiscation order is different to the purpose of a fine, as the imposition of a fine is the punishment.[528] As a confiscation order is ancillary to sentence, but is enforced as a fine, the enforcement of both must be effective.[529]

There is also a specific purpose of the enforcement process, including the activation of the default term. For both fines and confiscation, the purpose is not further punishment but is to see if there are alternative ways to enforce the financial penalty or encourage compliance.[530]

Arguments about a custodial sentence and the setting of the default term breaching principles about the totality of sentencing have failed because the custodial sentence has a different purpose to the default sentence.[531] The first is to punish the defendant for the

[525] *Hansford v Southampton Magistrates' Court and another* [2008] EWHC 67 (Admin), [2008] 4 All ER 432 [34].
[526] *May* (n 79).
[527] ibid [48].
[528] For example, *R v Norwich Magistrates' Court, ex parte Lilly* (1987) 151 JP 689 (QB).
[529] For example, in *R v Hereford Magistrates' Court, ex parte MacRae* (1998) 163 JP 433 (QB) 'wherever possible offenders will be fined rather than imprisoned. Central to that policy is the need to have effective machinery for fines enforcement. If fines lose credibility, if, in other words, offenders so punished are regarded as 'getting away with it' in every sense, then the balance will inevitably shift towards custodial disposals. It is, therefore, imperative that fines should be paid and that the system for enforcing them is efficient, expeditious and effective.' (Simon Brown, LJ).
[530] For fines see for example *MacRae* ibid. For confiscation see for example *R v John Smith* [2009] EWCA Crim 344; *R v Castillo* [2011] EWCA Crim 3173, [2012] 2 Cr App R (S) 36; *Johnson* (n 16); *R (on the application of Lloyd) v Bow Street Magistrates Court* [2003] EWHC 2294 (Admin) [34]; *O'Connell* (n 79); *R v Aspinwell* [2010] EWCA Crim 1294; [2011] 1 Cr App R (S) 54. A point also made by Simon Whitehead 'Dealing with unpaid confiscation orders–Part 1' (2000) 150(6923) NLJ 232.
[531] *R v Price* [2009] EWCA Crim 2918, [2010] 2 Cr App R (S) 44.

offence, the period in default is to ensure compliance with the confiscation order[532] and the activation of the default sentence is not a punishment.[533] As a result it is correct to say that the practical effect of the enforcement process for confiscation orders is to deny the defendant a choice between payment and serving the default term, the order must still be paid,[534] and that a defendant cannot 'buy' his way out of paying by serving the default term.[535] When hearing an application for a certificate of inadequacy where a confiscation order had been made under the Drug Trafficking Offences Act 1986, it was said, 'The purpose of these draconian procedures is obvious: they are intended, as has often been said, to make it as difficult as possible for those who traffic in drugs to get away with the proceeds of that traffic.'[536]

For HMCTS there is an emphasis on ensuring that the order of the court is enforced and upheld in all cases. The Service is committed to improving public confidence in the system by enforcing orders regardless of the value; although there is an acknowledgement that prioritising work is sometimes necessary based on the high value or the high profile of a case.[537] This prioritisation of cases has been accepted by the High Court.[538]

The purpose of both charging orders and restraint orders under the old legislation was similar namely to prevent the dissipation of assets, although in the case of restraint, the purpose can also be to prevent the depreciation of assets[539] whereas a charging order has the effect of securing the Crown's potential interest in the property.[540]

[532] *John Smith* (n 530).
[533] *O'Connell* (n 79) [36].
[534] Talbot and Hinton (n 3) 519.
[535] Hinton (n 473) 260.
[536] *R v Liverpool Magistrates' Court, ex parte Ansen* [1998] 1 All ER 692 (QB) 701 (May J).
[537] MOJ and HMCTS Written Evidence to the HAC 2016 (n 25) para 22.
[538] *O'Connell* (n 79) [40].
[539] Levi and Osofsky (n 162) 18-19.
[540] ibid 20.

The nature of a restraint order under POCA 2002 has the effect of freezing property pending a confiscation order.[541] The role of a restraint order is an ancillary one and is to preserve property;[542] to preserve realisable property to satisfy a confiscation order,[543] prevent disposal of assets[544] and maximize the amounts available for recovery.[545]

3.3.1 The purpose of a confiscation order: the debate

It is clear that when the confiscation regime was introduced it was aimed at the 'Mr Bigs' in the drugs world.[546] As the legislation has developed, the defendants it is aimed at have changed so that confiscation will be sought in all appropriate cases.[547] This has been the subject of criticism[548] and a discussion of this is outside the focus of this thesis, but the scope of orders is not. The change means that orders are made in respect of all defendants, not just 'Mr Bigs'. As a result, magistrates' courts need to be able to enforce all sizes of orders.

Despite the relative certainty in the case law and the clarity about the aim of enforcement, there has been considerable debate about what the purpose of the confiscation scheme is and how any success can be measured. There is no statutory purpose for a confiscation order as a confiscation order is not a sentence of the court, it is an order ancillary to

[541] Explanatory Notes to the Proceeds of Crime 2002, para 85.
[542] *Serious Fraud Office v Lexi Holdings PLC (In Administration) and another* [2008] EWCA Crim 1443, [2009] Q.B. 376 [8] (Keene LJ).
[543] For example, Sutherland Williams, Hopmeier and Jones (n 58) 15*;* In *Re Peters* [1988] 1 QB 871 (CA) a restraint order was described as akin to a Mareva injunction.
[544] *Mitchell Taylor and Talbot* vol 1 para 3.023 (R5: September 2004).
[545] Bullock, 'Enforcing Financial Penalties' (n 44) 330.
[546] In the debate on the Drug Trafficking Offences Bill it was said that the legislation was aimed at the '''Mr Bigs' in the drug trade'' Mr Robin Corbett HC Deb 21 January 1986 vol 90 cols 246-247.
[547] Government policy became that confiscation should be sought in "*all convictions* where criminals have profited" PIU Report (n 117) 63. One of the recommendations was that 'Confiscation of unlawful assets should become the norm in criminal proceedings, with proportionate steps taken to remove assets *wherever proceeds have been derived from crime*.' PIU Report (n 117) 9. The Asset Recovery Action Plan stated the '*nobody* should leave the [criminal justice] system still in possession of the benefits of his or her crime.' Asset Recovery Action Plan (n 243) 28 (emphasis added in each example).
[548] Bullock and Lister (n 33) 66-67.

sentence and is part of the sentencing process.[549] As such it is not subject to the statutory principles of sentencing in section 142 of the Criminal Justice Act 2003 which for a defendant aged 18 or over are:

- The punishment of offenders
- The reduction of crime (including its reduction by deterrence)
- The reform and rehabilitation of offenders
- The protection of the public, and
- The making of reparation by offenders to persons affected by their offences.

There is a form of reparation involved in confiscation. Any reparation in the confiscation order is usually to the State rather than to an individual, although an order for reparation to an individual can be made payable out of a confiscation order if the defendant would not have an available amount which was sufficient to pay both the confiscation order and the reparative order.[550]

However, an inconsistency and a lack of clarity in the objectives of the confiscation law has been identified.[551] An analysis of the review documents and the commentaries show that different views have been taken of the legislation and that different aims and purpose have been identified.

Hendry and King state that the purpose of ensuring defendants do not profit from their crime is unlikely to be controversial or cause any political dispute[552] and it has been said that the purpose of ensuring that defendants do not profit from their crime is one which

[549] *Phillips v United Kingdom* (n 500). In *R v Guraj* [2016] UKSC 65; [2017] 1 WLR 22 it was held that the purpose of the postponement provisions of the confiscation regime is to ensure that the *sentencing process* is effective (emphasis added) [22].
[550] Priority orders, that is compensation, victim surcharge, unlawful profit orders and slavery and trafficking reparation orders can be ordered to be paid out of a confiscation order, POCA 2002, s 13(3A).
[551] Alldridge, 'The Limits of Confiscation' (n 465) 829.
[552] Jennifer Hendry and Colin King, 'Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids' (2017) 11(4) Crim Law and Philos 733, 736.

everyone agrees with and needs 'no empirical verification'.[553] For the reasons outlined below, this thesis agrees with those statements and concludes that the overall purpose of the confiscation regime is to ensure that crime should not pay by depriving those convicted of criminal offences of their benefit from crime.

The purpose of ensuring that crime does not pay has formed part of the government strategies reviewed in this thesis and mentioned as an aim in the review documents which considers the regime. When announcing the PIU project, the then Prime Minister, Tony Blair, said:

> We want to ensure that crime doesn't pay. Seizing criminal assets deprives criminals and criminal organisations of their financial lifeblood. The challenge for law enforcement will become even greater as new technologies hide the money trail more effectively. We must ensure that law enforcement is ready to meet the challenges.[554]

However, an overall purpose, whilst helpful, is not sufficient to assess the effectiveness of the regime or any individual recommendations. As a result there has been further debate over the purpose of the confiscation regime and what constitutes success.[555] King explains that the principle that crime does not pay is a strong justification for the recovery of criminal assets,[556] and Alldridge asserts that it is easy to say that crime does not pay but that the full implications of the principle need to be worked through.[557] In order to determine the effectiveness of any policy, or indeed to assess the recommendations in

[553] R T Naylor, 'Wash-out: A critique of follow-the-money methods in crime control policy' (1999) 32(1) Crime, Law & Social Change 1, 34. It has also been described as the 'first aim' of confiscation Bullock and Lister (n 33) 48.
[554] Announcing the PIU project on 3 September 1999, PIU Report (n 117) 13. There is another example from 1995 when Burns stated that 'Depriving criminals of the proceeds of their crimes is important in ensuring that a strong message is sent that crime does not pay' I M Burns Deputy Under Secretary of State, Home Office, Police Department, May 1995 in foreword to Levi and Osofsky (n 162).
[555] The section in the Home Affairs Committee's report on the purpose of POCA 2002 was headed 'Measures of success: collection or disruption?' HAC 2016 Report (n 26) 26.
[556] King, Civil Forfeiture and Article 6 of the ECHR (n 464) 375.
[557] Alldridge, 'The Limits of Confiscation' (n 465) 827.

this thesis it is necessary to understand what ensuring crime does not pay means, and what would count as a successful policy or successful recommendations.

An analysis of the review documents and the development of the legislation shows that the secondary aims of confiscation[558] which have been identified since the regime began can be summarised as:

- Recovery of the proceeds from crime[559]
- Reassurance to the public that crime does not pay[560]
- Disruption of criminality[561]
- Reduction in harm[562]
- Deterrence[563]
- Denying criminals the use of their assets/Preventing the reinvestment from crime into further offending[564]
- Removing negative role models[565]

[558] Some of the aims in the documents refer to 'Asset Recovery' which includes, but is wider than, confiscation, n 11.
[559] PIU Report (n 117) 5; CPS Asset Recovery Strategy (n 321) 14; NAO Report (n 71) 10; PAC Report (n 328) 7; NAO Progress Report (n 367) 35; PAC Progress Report (n 348) 12; HAC 2016 Report (n 26) 5.
[560] Asset Recovery Action Plan (n 243) 42; NAO Report (n 71) 10; PAC Report (n 328) 2; NAO Progress Report (n 367) 35; PAC Progress Report (n 348) 12.
[561] Levi and Osofsky (n 162) 13-14; PIU Report (n 117) 6; Asset Recovery Action Plan (n 243) 42; PAC Report (n 328) 7; NAO Progress Report (n 367) 35; PAC Progress Report (n 348) 12; HAC 2016 Report (n 26) 5.
[562] PIU Report (n 117) 16; Asset Recovery Action Plan (n 243) 42; NAO Progress Report (n 367) 35; PAC Progress Report (n 348) 12.
[563] PIU Report (n 117) 6; Asset Recovery Action Plan (n 243) 42; CPS Asset Recovery Strategy (n 321) 14; PAC Report (n 328) 7; NAO Progress Report (n 367) 35; PAC Progress Report (n 348) 12; HAC 2016 Report (n 26) 5. Although Levi and Osofsky found that any deterrence effect is limited as most of the money is spent before investigation or confiscation, Levi and Osofsky (n 162) 12.
[564] PIU Report (n 117) 5; Asset Recovery Action Plan (n 243) 42; NAO Progress Report (n 367) 5; CPS Asset Recovery Strategy (n 321) 14; HAC 2016 Report (n 26) 5.
[565] PIU Report (n 117) 5; Asset Recovery Action Plan (n 243) 42; NAO Report (n 71) 10; NAO Progress Report (n 367) 35; PAC Progress Report (n 348) 12.

Researchers have also identified these secondary aims.[566] However, this would still not answer the question, what counts as success? The review documents in chapter 2 show a difference of opinion between the assessment of value for money, collection rates, or disruption as the success factors, and this was one of the key issues for the HAC in 2016, when King had to ask the HAC what the purpose of confiscation is.

As a result, the HAC considered the purpose of POCA 2002 at 'the heart of [its] inquiry' and whether the measure of success for the confiscation regime should be the amount collected or the disruption of criminality.[567] In his written evidence King suggested that the Committee should consider the purpose of POCA and whether it is intended to disrupt criminal activity, raise money, or both; and if both which should take priority.[568] The Committee considered this question and found that there was an element of both but that the emphasis of statistics had been placed on collection. It found that if the only success criteria was collection rates then performance would be 'abysmal' but that it was only half of the story. It reflected on the evidence of the CPS and Wood that there should be less emphasis on the collection statistics and more on disruption,[569] a view supported by King.[570] The report quotes the evidence of King who agreed that there is 'too much emphasis on how much money is raised'.[571] The Committee found that his comments 'echoed a wealth of evidence' from others who had given evidence.[572]

The Committee took into account the stated aims of the Home Office which are 'to deny criminals the use of their assets, recover the proceeds of crime, and deter and disrupt criminality'. It recommended that the government should publish statistics each year

[566] For example, King, Civil Forfeiture and Article 6 of the ECHR (n 464) 375; King and Walker (n 11) 7; Bullock and Lister (n 33) 48. Kruisbergen, Kleemans and Kouwenberg (n 54) 678; Levi 'Reflections on Proceeds of Crime' (n 38) 1.
[567] HAC 2016 Report (n 26) 26.
[568] Colin King, Written Evidence to the Home Affairs Committee, *Proceeds of Crime* (HC 2016-2017, 25) para 14 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/proceeds-of-crime/written/29450.html> accessed 16 August 2016.
[569] HAC 2016 Report (n 26) 26.
[570] ibid 27.
[571] ibid 27.
[572] ibid 27.

including measures against each of the aims, a measure of how crime rates have been influenced by denying criminals of their assets, and lists of all assets seized from criminals over a year. It concluded that success should be measured against both the efficient collection of criminal assets and the disruption of criminal activities, acknowledging the difficulties with quantifying the latter.[573] The government agreed to publish annual asset recovery statistics[574] which it started in 2017[575] to look at ways to measure disruption.[576]

The focus on disruption is not surprising. The disruption of criminal activity has featured in the review documents.[577] King had co-authored an article which referred to the 'disruption factor' and called for disruption to be identified and measured[578] and although it reviews the civil regime, the arguments apply to confiscation.[579] It is therefore understandable that he asked his key question to the HAC which was central to the report.

As a result, the recommendations in the HAC 2016 Report about measuring disruption were the culmination of suggestions in previous reviews which had questioned the concentration of collection rates and not disruption. It is clear then that when considering the policy and aims of the regime, the consideration of collection rates in themselves are insufficient.

3.3.2 Measuring disruption

Although Sproat writes about other aspects of asset recovery,[580] he has identified difficulties in the measurement of disruption because of a lack of statistics.[581] This supports the findings in the HAC 2016 Report which acknowledged that the disruption

[573] ibid 27.
[574] ibid 12.
[575] *Asset Recovery Statistical Bulletin 2011/12-2016/17* (n 28).
[576] Government Response to the HAC 2016 Report (n 358) 10.
[577] Text to n 561.
[578] Martin Collins and Colin King 'The disruption of crime in Scotland through non-conviction based asset forfeiture' (2013) 16(4) JMLC 379, 384.
[579] King, Written Evidence to the HAC 2016 (n 568) para 16.
[580] For example, Peter Sproat, 'Payback time? To what extent has the new policing of assets provided new assets for policing?' (2009) 12(4) JMLC 392.
[581] Peter Sproat, 'An evaluation of the UK's anti-money laundering and asset recovery regime' (2007) 47 Crime Law Soc Change 169, 179-183.

element is difficult to quantify. The Home Office published the first of an annual set of statistics in September 2017[582] but this did not include a measurement of disruption. However, a menu of tactics[583] has been designed to support the NCAs disruption strategy.[584] This gives examples of the types of interventions that can disrupt criminality and includes restraint orders and compliance orders. It is suggested that the number of orders made each year could be calculated, along with whether the confiscation order has been satisfied, which would indicate both disruption and collection rates. It is also suggested that payment orders and charging orders, whether made under the confiscation legislation or not, would also fit into these categories to measure disruption.

3.3.3 POCA 2002, a specific purpose?

This section has outlined the purpose of the confiscation regime, but in addition, this research has identified that POCA 2002 had a specific purpose. Chapter 2 explains that one of the aims of the government strategy was to have the same confiscation order provisions for both drugs and non-drugs offences. As part of that strategy, the PIU recommended that all confiscation hearings should be heard at the Crown Court, along with any applications previously heard in the High Court including restraint and charging order applications.[585] This was described as creating a one stop shop in relation to the Crown Court.[586] This thesis considers whether the aim of creating a one stop shop has in fact been achieved, and concludes that while it has to a certain extent, more can be done in this regard which would also improve the enforcement of confiscation orders in the magistrates' court and provide an alternative to restraint.

The recommendations in this thesis in relation to payment orders, and in particular charging orders, would meet that purpose. They would also provide an alternative to the

[582] *Asset Recovery Statistical Bulletin 2011/12-2016/17* (n 28).
[583] College of Policing, Menu of Tactics (n 447).
[584] Text to n 445 in chapter 2.
[585] Text to n 207-n 210 in chapter 2.
[586] Text to n 31 in chapter 1.

need to provide for early restraint. As a result, this thesis will assess 'success' against all the purposes in this chapter.

3.4 Measuring collection rates

The HAC concluded that the figures of outstanding debt are largely artificial as they include interest and accounts that cannot be collected. It therefore recommended that accounts should be categorised into collectable and uncollectable categories[587] and the HMCTS Trust Statement now identifies these figures.[588]

Despite the concentration on collection rates as a measure of success there have been difficulties both in the collation of statistics and with their interpretation. The ability to collect statistics has improved since the beginning of the regime as it has now become easier to obtain data since the introduction of JARD in 2006.[589]

Even though statistics are now more readily available, the Home Office has described the measurement of performance in enforcement as 'surprisingly complex' explaining that practically it was difficult to measure the proportion of the value of orders made against the value enforced.[590] Although the criminal justice agencies have monthly reports about what is collectable from priority orders, the NAO criticised the lack of statistics about why the figures are so low which it felt could be used to determine the best actions to take.[591]

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[587] HAC 2016 Report (n 26) 30-31.

[588] The value of confiscation orders considered uncollectable are shown as an 'impairment' HMCTS Trust Statement 2017-18 (n 23) 38. The figures are reproduced in Appendix 1 to this thesis.

[589] The review documents highlight the difficulties prior to JARD. The HAC Seventh Report reported on orders made under the DTOA 1986, but there were no figures available to consider the effectiveness of the recovery of the approximate £11 million worth of confiscation orders although shortfalls had been identified by witnesses, HAC Seventh Report (n 129) xviii. The Working Group Third Report considered the practical difficulties experienced by Justices' Clerks in enforcing confiscation orders and examined statistics and replies by Justices' Clerks rather than centrally held data, Working Group Third Report (n 126) para 2.1. It is not surprising that Levi and Osofsky had difficulties in obtaining accurate data in relation to the number and value of orders made; and the amounts collected, noting that there was no accurate data about how much was recovered from defendants Levi and Osofsky (n 162) 54.

[590] Asset Recovery Action Plan (n 243) 18.

[591] The NAO Progress Report (n 367) 28.

This has echoed findings in the review documents which show that there are difficulties in evaluating the collection rates, for example, because receipts are collected often a long time after imposition,[592] particularly if the court has granted lengthy time for payment, which was identified as a particular issue for high value orders.[593] Figures can also be affected perversely very easily by a particularly high or low number or value of confiscation orders.[594] Difficulties are also caused because of the costs of receivers, and the fact that confiscation orders are unrealistically high if there is an overvaluation of assets.[595] Bullock et al found errors in the data when analysing it for their research[596] and the lack of robust, reliable or available data is an issue identified by academics.[597]

Given these difficulties, statistics are not relied on to support the recommendations in this thesis. The view of the government is that the use of statistics about the volume and value of restraint orders is not necessarily helpful as a measure of performance or as a target,[598] which must be correct. Because of this t is suggested that it would not be helpful to use the number of charging or payment orders made as a performance measure in itself. However the number of charging or payment orders made could be a useful indicator of disruption and would echo the tactics to measure disruption used to support the NCAs disruption strategy.[599] It may also be a useful indicator to measure how many confiscation orders are paid if a charging order or payment order is in force.

[592] Payback Time (n 173) 48.
[593] Asset Recovery Action Plan (n 243) 18-19.
[594] ibid 19.
[595] Working Group Third Report (n 126) paras 2.2-2.5, 2.7.
[596] Bullock and others (n 29) 5.
[597] Bullock and Lister (n 33) 63. Harvey also identifies issues with reconciling data from different data sets. Harvey (n 29) 193.
[598] Government Response to the HAC 2016 Report (n 432) 3.
[599] College of Policing, Menu of Tactics (n 447).

3.5 The development of the legislation to date

3.5.1 A change in the law because of the case of *Cuthbertson*

It was the inability of the judiciary to use existing legislation to confiscate the proceeds of producing and supplying Class A drugs, identified in *Cuthbertson*[600] which led to the introduction of the DTOA 1986 and the introduction of criminal confiscation orders. In *Cuthbertson* the defendants were charged with conspiracy at common law with other persons to contravene the provisions of section 4 of the MDA 1971 namely the producing and supplying of a Class A drug.[601]

After conviction the trial judge made orders of forfeiture against the defendants pursuant to section 27(1) of the MDA 1971 which provides that:

> ...the court by or before which a person is convicted of an offence under this Act...may order anything shown to the satisfaction of the court to relate to the offence, to be forfeited and either destroyed or dealt with in such other manner as the court may order.

The defendants had been manufacturing and supplying Class A drugs for several years and had been arrested in an operation known as 'Operation Julie'.[602] The total amount of the assets representing the proceeds of the defendants' criminal enterprise was three-quarters of a million pounds which was forfeited by the trial judge. Two of the defendants had transferred money into bank accounts abroad.

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[600] *Cuthbertson* (n 5).

[601] Section 4 of the MDA 1971 provides that:'(1) ... it shall not be lawful for a person (a) to produce a controlled drug; or (b) to supply or offer to supply a controlled drug to another.(2) ... it is an offence for a person (a) to produce a controlled drug in contravention of subsection (1) above; or (b) to be concerned in the production of such a drug in contravention of that subsection by another.'

[602] For an overview of Operation Julie and the public interest in the case see Dick Lee and Colin Pratt, Operation Julie (WH Allen 1978); Lyn Ebenezer, Operation Julie The World's Greatest LSD Bust (Y Lolfa Cyf 2010).

There were two reasons why the House of Lords held that the proceeds of the drugs offences could not be confiscated. It was held that 'an offence under this Act' in s27(1) could not include a conspiracy to commit an offence under the Act and therefore a forfeiture order could not be made. It was held that to decide otherwise would mean putting a strained construction on the wording of the legislation; and that '(f)orfeiture is a penalty; justice requires that it should not be imposed by a court in the absence of a finding, or an admission of guilt.'[603]

More importantly for the scope of this research, the second reason the court concluded that there was no power to confiscate the proceeds of crime was because section 27 MDA 1971 only allowed the forfeiture of tangible things to be destroyed or dealt with in another way as the court thinks fit, the section was never meant to be used to strip drug traffickers of the profits of their drug trafficking.[604] In criticising the trial judge and the Court of Appeal for making the order for forfeiture, Lord Diplock said that they:

> appear to have been influenced by the argument of the Crown that the parliamentary purpose to which effect was intended to be given by section 27 was to strip drug traffickers of the whole of the profits of their crime whatever might be the way in which they had invested those profits...But this, with respect, cannot be right...it could not plausibly be suggested that the section authorises the court (so to speak) to 'follow the assets'.[605]

Lord Diplock came to this conclusion with 'considerable regret'[606] but had no other option as it was a matter of pure construction of section 27 that a forfeiture order could only be used for tangible objects and there could be no preconception that Parliament intended to use the section to strip professional drug dealers of all the profits of their crimes, even if

[603] *Cuthbertson* (n 5) 484 (Lord Diplock).
[604] ibid 485 (Lord Diplock).
[605] ibid 484.
[606] ibid 479 (Lord Diplock). Lord Edmund-Davies came to the same 'reluctant conclusion', ibid 485 (Lord Edmund-Davies).

that aim is laudable.[607] The case of *Cuthbertson* and the inability of the court to forfeit the money caught the imagination of the public[608] and led to the Hodgson Report.

3.5.2 The Hodgson Report

In 1984 The Hodgson Committee reviewed the law in the light of *Cuthbertson* and the 'apparent inability of the Court effectively to deprive an offender of the profits of his offending' which caused real concern.[609] The Committee was given the following remit:

> to consider the present law relating to the forfeiture of property associated with crime in the light of the House of Lords' judgment in *R v Cuthbertson and Others*, 12 June 1980; to consider the law and procedure relating to compensation and restitution of property to the victims of crime, and the operation of criminal bankruptcy; to assess how far the powers of criminal courts to impose monetary penalties meet the need to strip offenders of their ill-gotten gains, and whether further provisions are necessary to ensure that the fruits of crime are returned either to the innocent owners of property or to the Crown.[610]

The Committee's report, the Hodgson Report, concluded that courts should be given a new power to confiscate the profits of crime but became aware of problems when considering how confiscation orders would be enforced.[611] The Report defined confiscation as 'the depriving of an offender of the proceeds or profits of crime' as opposed to forfeiture which they defined as 'the power of the Court to take property that is immediately connected with an offence'[612] because of a realisation at an early stage that

[607] ibid 480.
[608] n 602.
[609] Hodgson Report (n 123) 3.
[610] ibid 4.
[611] ibid 70.
[612] ibid 5.

there were no generally accepted definitions and because otherwise the terms may be treated as synonymous.[613]

The Report recommended the introduction of confiscation orders and also made a number of recommendations. It considered two matters of concern, that crime should not pay, and that no injustice should be done.[614] The specific recommendations in relation to the imposition of a confiscation order fall outside the focus of this research,[615] however, there were a number of recommendations in relation to restraint which are relevant to this research.

Pre-trial restraint was recommended if there was a prima facie case that the defendant had committed an indictable offence and compensation or fines totalling £10,000 or more would be likely on conviction. The Report recommended that a restraint order could be made ex parte but that on acquittal there should be discretion on the trial judge to order compensation. Finally, it recommended that a receiver should be appointed under the Director of Public Prosecutions (DPP) to supervise the property, but the police should not be granted powers of search for assets.[616] These recommendations started the development of the law relating to restraint that exists today which is analysed in the next chapter.

3.5.3 The introduction of the powers of confiscation

The legislation permitting the confiscation of criminal assets has developed in a piecemeal fashion.[617] The Act which introduced the power to make a confiscation order, the DTOA 1986, contained a number of the recommendations from the Hodgson report. The power to make a confiscation order was given to the Crown Court with enforcement powers of making restraint and charging orders introduced in the High Court. As the name suggests

[613] ibid 4. For a consideration of the development of forfeiture see, for example, Alldridge *Money Laundering Law* (n 39) 71-73.
[614] Hodgson Report (n 123) 79.
[615] ibid 151-152.
[616] ibid 154.
[617] Text to n 202 in chapter 2.

the Act only applied to drugs offences and was amended before being replaced by the DTA 1994. The power to make confiscation orders for general crime was introduced in a limited form by the CJA 1988 and came into force on 3 April 1989 where the defendant's benefit was at least £10,000 but the £10,000 minimum was subsequently removed. The CJA 1988 was amended and it and the DTA 1994 were brought more into line although some differences remain between the drugs and general crime legislation.

POCA 2002 was a wide-ranging Act covering provisions other than confiscation, but it consolidated and changed the previous legislation whilst strengthening the ability of authorities to 'follow the money'. It too has been amended on many occasions, most recently by the Policing and Crime Act 2009, the Crime and Courts Act 2013, the Serious Crime Act (SCA) 2015 and the Criminal Finances Act (CFA) 2017.[618]

One of the issues for the magistrates' court is that it has to enforce confiscation orders made under all Acts. To understand why it causes difficulty, it is necessary to understand the way the law has developed and the amendments to the legislation directly relevant to this research.

3.5.4 DTOA 1986

The ability for Crown Courts to make a confiscation order pursuant to the DTOA 1986 came into force on 12 January 1987. A financial order, there were powers for the High Court to make a restraint order or charging order, with the other enforcement provisions based on the fines provisions.[619] As such, time for payment could be for any period set by the Crown Court judge[620] and the Act contained provisions for the magistrates' court to enforce confiscation orders in a similar way to a fine, which have continued with only minor amendment to the present day. An article written by experts in the Home Office

[618] Changes were also made by the Modern Slavery Act 2015, but these are not directly relevant to the research covered by this thesis.
[619] DTOA 1986, s 6.
[620] Powers of Criminal Courts Act (PCCA) 1973, s 31. The provision is now the PCC(S)A Act 2000, s 139.

explained the aim of the enforcement provisions. They explained that 'the burden' of enforcing orders was given to magistrates' courts using their fines based powers, and to the High Court in larger and more complex cases, by which they meant using restraint, charging and receivership orders.[621] This shows how the provisions were intended to be used, but in reality the fines based powers of the magistrates' court have been used in all types of cases, no matter how large or complex, and have changed little. This adds strength to the premise in this research that more powers are needed to help the magistrates' court to successfully enforce confiscation orders.

The Act did not provide for interest to accrue on unpaid confiscation orders, or for enforcement to continue after the default term had been served and so amendments were seen as necessary. The Criminal Justice (International Cooperation) Act 1990 provided for interest to be paid if a confiscation order was not paid as ordered,[622] and for the confiscation order to be reviewed if there was an increase in the realisable property which proved to be of greater value than originally assessed by the court.[623]

The Criminal Justice Act 1993 contained provisions to amend the DTOA 1986 including a provision that serving the default sentence did not wipe out the debt. However, these amendments were not brought into force and instead, the DTOA 1986 was replaced by the DTA 1994 containing those provisions.

3.5.5 DTA 1994

The DTA 1994 came into force for offences on or after 3 February 1995. It replaced the DTOA but also made some changes to the regime. Like the DTOA 1986 it applied only to drugs offences and confiscation orders could only be made in the Crown Court. It made changes to the imposition of confiscation orders, but relevant to this thesis, the Act continued the provisions for confiscation orders to be enforced as a fine, with the same

[621] 'The UK Drug Trafficking Offences Act 1986' (n 17) 1632.
[622] Criminal Justice (International Cooperation) Act 1990, s 15.
[623] Criminal Justice (International Cooperation) Act 1990, s 16.

differences.[624] It provided that the serving of a default sentence did not wipe out the debt,[625] provided for interest to accrue after time for payment expired[626] (although time for paying the order could still be for any period) and gave powers to the Crown Court to reconsider or vary confiscation orders.[627]

3.5.6 CJA 1988

The DTOA 1986 only permitted confiscation orders to be made in cases involving drug trafficking, as the name suggests. 'Parliament was not blind to this fact and some three years later enacted Part VI of the Criminal Justice Act 1988.'[628] The CJA 1988 introduced confiscation orders for general criminal conduct which could be made by the Crown Court or in limited circumstances by the magistrates' court.[629] It came into force for offences on or after 3 April 1989 and was subsequently amended.[630]

When debating the confiscation provisions that became the Criminal Justice Act 1988, Mr Hurd, then Home Secretary, explained that although the provisions followed the DTOA 1986, the government had used a different model. This is because drug trafficking was felt to be a special case, because it is so profitable and because of the revulsion the public rightly felt at the destruction which it wreaks**.** He further explained that the provisions of the DTOA 1986 would be important new powers for the courts which would strengthen their hand in dealing with big-time criminals.[631]

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[624] DTA 1994, s 9.
[625] DTA 1994, s 9(3).
[626] DTA 1994, s 10.
[627] DTA 1994, ss 13 to 16.
[628] Talbot and Hinton (n 3) 506.
[629] Schedule 4 to the Criminal Justice Act 1988 listed the offences for which the magistrates' court could a make confiscation order.
[630] The Act was also amended by the Criminal Justice Act 1993, but these amendments are not relevant to this thesis.
[631] The Secretary of State for the Home Department (Mr Douglas Hurd) HC Deb 27 November 1986, vol 106, cols 471-472.

Originally the CJA 1988 did not provide for the accrual of interest[632] and like the DTOA 1986 serving the default term did not wipe out the debt. The CJA 1988 was amended by the Proceeds of Crime Act (POCA) 1995. The second reading of the Proceeds of Crime Bill[633] (which became the POCA 1995), took place on 3 February 1995 the day the DTA 1994 came into force. The Bill was a private member's Bill presented by Sir John Hannam, MP for Exeter. He explained how the Bill aimed to make life more difficult for those who profit from crime and especially to those making a living out of the proceeds of crime, calling them 'life-style criminals.'[634] He explained that the assumptions in the CJA 1988 did not go as far as the DTOA 1986 which had more far reaching assumptions, because the general crime differed from clearly defined drug trafficking offences. He also explained how closing the loophole on serving the default sentence wiping out the debt was necessary as it was contrary to the spirit of the confiscation legislation for defendants to hang on to their ill-gotten gains.[635]

As a result, POCA 1995 amended the CJA 1988 so that specific provisions were inserted into the Act for interest to accrue on unpaid orders[636] and to ensure that serving the default term did not wipe out the debt,[637] but the time for payment period which could be granted by the court on imposition was still unlimited. These amendments by POCA 1995 mean that the interest and default term not wiping out the debt were only aligned between the drugs and non-drugs offences from 1 November 1995 when the amendments came into force. The provisions of POCA 1995 which extended the provisions of drug trafficking confiscation legislation to cover other serious crime were welcomed by the HAC Organised Crime Report.[638]

[632] Until the Criminal Justice (International Cooperation) Act 1990, s 15 provided for interest to accrue.
[633] Proceeds of Crime HC Bill (1994-95) [10].
[634] John Hannam HC Deb 3 February 1995, vol 253, col 1322.
[635] John Hannam HC Deb 3 February 1995, vol 253, cols 1324-1325.
[636] CJA 1988, s 75A as inserted by POCA 1995, s9.
[637] CJA 1988, s 75 as amended by POCA 1995, s8.
[638] HAC Organised Crime Report (n 63) xlviii.

Because of the amendments to the Criminal Justice Act 1988, different schemes apply under the Act depending on the date of offence and the date proceedings commenced against the defendant. This impacts directly on the enforcement of confiscation orders in the magistrates' court, and when checking the relevant enforcement provisions, it is not enough to check whether the order was made under the CJA 1988 but also whether, for example, the serving of the default term wipes out the debt.

3.5.7 The road to POCA 2002

Despite the various amendments to the legislation and the consolidating and amending nature of the DTA 1994, there were still difficulties identified in the legislation. The Working Group Third Report considered the regime, and made recommendations for change, which Alldridge described as 'some preliminary urgings from the Home Office'[639] before the PIU report was published which led to the enactment of POCA 2002.

3.5.8 POCA 2002

The confiscation provisions of POCA 2002[640] came into force for all offences committed on or after 23rd March 2003 and were designed to simplify the law and provide for a one stop shop in relation to confiscation, whereby all matters would be heard in the Crown Court. Restraint order hearings moved from the High Court, the powers were strengthened; applications for variation also moved to the Crown Court and there were no longer any powers for the magistrates' court to make a confiscation order.[641]

Changes were made to POCA 2002 by the SCA 2015 which gave effect to the recommendations in the 2013 Serious and Organised Crime Strategy[642] and there was

[639] Alldridge *Money Laundering Law* (n 39) 81.
[640] Contained in Part 2 of POCA 2002.
[641] In the previous legislation the magistrates' court could make confiscation orders in limited circumstances in the CJA 1988.
[642] 2013 Serious and Organised Crime Strategy (n 62) 34-36.

cross party support for the Bill[643] with agreement that the changes were needed.[644] The changes came into effect on 1st June 2015[645] and other changes to POCA 2002 were also brought into force on the same date.[646] Further amendments were made by the CFA 2017 when changes were introduced to provide new capabilities and provide powers to recover the proceeds of crime, and to tackle money laundering, corruption and terrorist financing.[647] There were also amendments to POCA 2002 directly relevant to this thesis as the provisions for the magistrates' court to make a payment order[648] and for an application to be made to the Crown Court to discharge an order were amended.[649]

3.5.9 Commentaries on the development of the legislation

Wasik reviewed the Hodgson Report in its entirety with a section on confiscation.[650] He concentrated on the proposals for making confiscation orders and thought that there was a need for more detail,[651] but agreed with the idea of restraint as he considered that powers of confiscation would only be effective with powers to prevent a person accused transferring funds to a place where they cannot be reached, and emphasised the need for safeguards.[652] His view was that 'hardly anyone' would disagree that some powers were

[643] Serious Crime HL Bill (2014-15) 1.
[644] For example Baroness Smith of Basildon (Lab) HL Deb 16 June 2014, vol 754, cols 648-649; Baroness Hamwee (LD) HL Deb 16 June 2014, vol 754, cols 652- 653; The Lord Bishop of Derby HL Deb 16 June 2014, vol 754, cols 658- 659; and Lord Henley (Con) HL Deb 16 June 2014, vol 754, cols 660-661.
[645] Relevant to this thesis, the SCA 2015 amended the powers of the Crown Court to give a discretion when making a confiscation order, the powers to make a compliance order or section 10A determination and order the discharge of an order. It changed the default terms and amended the payment order provisions available to the magistrates' court.
[646] Amendments were made by the Policing and Crime Act 2009, text to n 953-n 958 in chapter 4.
[647] Explanatory Notes to the Criminal Finances Act 2015, para 1.
[648] The changes to payment orders made by the CFA 2017 are not relevant to this thesis.
[649] Text to n 1151.
[650] Martin Wasik, 'The Hodgson Committee Report on The Profits of Crime and Their Recovery' [1984] (Dec) Crim LR 708.
[651] For example he said that it was a pity that the report did not go into more detail about the procedural arrangements envisaged for confiscation inquiries, for example what standard of proof is required of the prosecution and defence in the inquiry, ibid 711.
[652] ibid 712.

needed,[653] and concluded that the basic scheme of confiscation outlined seemed to be a good one.[654]

With hindsight Wasik's conclusions on what were proposed provisions were justified. He was writing in 1984, and the regime became operational in 1987 when the DTOA 1986 came into force. Although there have been legislative changes, and more are needed, it is an accepted view that defendants should not profit from their crime,[655] and that restraint orders should be used effectively.[656] The basic elements of the scheme remain the same, and the review documents do not call for a completely new regime.

However, as the legislation was introduced and has been changed there have been critics. Thomas asserted that 'As a means of stripping drug traffickers of their profits, the [Drug Trafficking Offences] Act has had limited success.'[657] He explained that in 1991 confiscation orders were made in just over a quarter of cases in which the mandatory provisions of the Act applied and that the majority of the orders were made for relatively small amounts. He backed up his argument with some statistics and also commented that many of the small orders must cost more in court time used to make the order than the face value of the order itself.[658]

Thomas' comments are similar to those of Levi and Osofsky who published their report a year later,[659] but unlike them, Thomas concentrated on the imposition of orders. His only specific reference to the powers of the magistrates' court was the explanation that the default term imposed by the Crown Court is the same as the periods for non-payment of a fine.[660] Like Levi and Osofsky's conclusions his comments appear harsh and there was positive feedback on the operation of the DTOA 1986 from the Working Group First

[653] ibid 709.
[654] ibid 710.
[655] Text to n 552-n 553 in chapter 3.
[656] Text to n 656 in chapter 4.
[657] DA Thomas, 'The Criminal Justice Act 1993: Part 1: Confiscation orders and drug trafficking' [1994] (Feb) Crim LR 93.
[658] ibid 93.
[659] Levi and Osofsky (n 162) vi; text to n 174.
[660] Thomas (n 657) 94.

Report[661] and the Home Office Seventh Report[662] although clearly there were issues with the regime that needed attention.

Thomas' article reviewed the proposed amendments to the DTOA 1986 by the CJA 1993 and he was concerned that having the old and new versions of the Act would have continued to exist side-by-side possibly for a number of years with obvious scope for errors.[663] Like later authors he was concentrating on the imposition of confiscation orders, but his comments could apply to the enforcement of orders in the magistrates' court. Their management is complex and the powers to enforce a confiscation order depend in the main on the law in existence at the time of imposition which adds complexity to the magistrates' court as different powers will apply to the time for payment provisions, the default sentence and whether or not a payment order can be made.

The Home Office Guide explains that the original confiscation scheme in the CJA 1988 was less robust than the drug trafficking regime but was brought more closely into line by the subsequent arrangements.[664] Harris went further and described the provisions of the CJA 1988 as significantly weaker than the DTOA[665] but like other commentators he was focusing on the imposition of the order, and from an enforcement point of view the powers were the same as the DTOA 1986, both in terms of the powers to make restraint and charging orders at the High Court, and the fines based powers of the magistrates' court.

Support for POCA 2002 came from Kennedy who concluded that the confiscation provisions are 'well designed and fit for purpose'.[666] The confiscation regime is only a part of Kennedy's research, and he makes this claim despite his reflections on the problems

[661] It felt that the general perception was that the powers introduced in the Drug Trafficking Offences Act to confiscate proceeds of drug trafficking had worked reasonably well since their implementation, Working Group First Report (n 137) 1.
[662] The HAC Seventh Report described the DTOA 1986 as an overall success (n 129) xvi.
[663] Thomas (n 657) 100.
[664] Home Office Guide (n 4) 6.
[665] Ron Harris, 'United Kingdom Legislation: Money Laundering and Confiscation of Drugs Trafficking Assets and Proceeds of Other Crime' (1993) 19 Commw L Bull 1976, 1981.
[666] Anthony Kennedy, 'An evaluation of the recovery of criminal proceeds in the United Kingdom' (2007) 10(1) JMLC 33, 36.

with enforcing orders describing deficiencies therein including delays and the costs involved. Yet there have been criticisms. Like others, Lawrence's criticisms are aimed at the provisions for imposing confiscation orders[667] and some of the areas fall outside the scope of this research, but he was scathing about elements of POCA 2002. He was critical of the fact that the defendant has to rebut the assumptions in the Act,[668] but this has been upheld in the European Court of Human Rights.[669] Some of his concerns were justified. He deplored the use of targets for making confiscation orders[670] which were eventually seen as unhelpful and no longer apply.[671] Of particular relevance to this research, he raised issues with the operation of joint benefit cases and he was concerned about double recovery by the State.

This was addressed in *Ahmad and Ahmed* yet in that case even the Supreme Court has noted the 'fair criticism' that the 2002 Act has often been described as 'poorly drafted'.[672] It balanced this criticism by explaining that the problems can in part be explained by the difficulties of recovering the proceeds of crime by the use of confiscation orders, which are particularly acute in sophisticated crime, giving examples of large scale financial frauds, substantial illegal drug importing operations and people trafficking. It identified at least three reasons why difficulties occur, difficulties in identifying and locating assets, uncertainty about the extent of the involvement of individuals or the profits obtained, and the difficulties in applying the established legal principles in POCA 2002 to issues such as joint acquisition.[673]

Despite this balanced view, Coltart reviewed the case and described the imposition of a confiscation order as a 'Labyrinthine exercise' and opined that in relation to POCA 2002,

[667] Sir Ian Lawrence, 'Draconian and manifestly unjust: how the confiscation regime has developed' (2008) 76 Amicus Curiae 22, 22.
[668] ibid 23.
[669] *Grayson and Barnham* (n 509); text to n 697.
[670] Lawrence (n 667) 24.
[671] *Local to Global* (n 224) 20.
[672] *Ahmad and Ahmed* (n 12) [35].
[673] ibid [35]-[36].

the time had come to 'rip it up and start again'.[674] Notwithstanding the amendments to POCA 2002, Hopmeier and Mills describe the process of making a confiscation order as 'fraught with problems' as there is uncertainty in applying the law and defendants try to avoid paying their order.[675]

These are obviously strong and divergent views. The regime is clearly not perfect but there is an accepted need for it and even Lawrence's criticisms, which have been addressed in part, are mitigated by his view that it is necessary to deprive defendants of the benefit from crime.[676] The imposition of confiscation orders has been the sole or main focus of these articles and there are still practical issues, but the regime has to a large extent stood the test of time despite the need for a number of legislative amendments to both the pre-POCA and POCA 2002 legislation. However, POCA 2002 has not solved all the issues on imposition and given the difficulties which still exist it seems premature for Kennedy to have claimed that the provisions are fit for purpose. This research considers the difficulties with enforcing confiscation orders in practice, including a consideration of the review documents which gives a more balanced view, as desired by Wood,[677] and meets the need to review the enforcement provisions as well as the investigation and imposition stages.[678] It shows a need for further improvement in some elements of the regime, however, the basic scheme is, as Wasik predicted, a good one to meet the need that crime should not pay. That said, the imposition of confiscation orders should not be looked at in isolation, and any future changes should assess the impact on enforcement, especially on the powers of the magistrates' court.

[674] Christopher Coltart, 'Rip it up and start again' (2014) 23 LS Gaz 10 (2).
[675] HHJ Michael Hopmeier and Alexander Mills, 'Post-conviction Confiscation in England and Wales, in Colin King, Clive Walker and Jimmy Gurulé, (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law'* (Palgrave Macmillan 2018) 447, 447.
[676] Lawrence (n 667) 22.
[677] Wood, Enforcing Criminal Confiscation Orders (n2) 4.
[678] Vettori (n 47) 20.

3.6 Imposing a confiscation order

Changes to the rules on imposition can impact directly on the magistrates' court. When making a confiscation order the Crown Court fixes a financial amount, it does not confiscate assets. The order is made ancillary to sentence and can be made before, on or after sentence[679] and the Crown Court must take into account the confiscation order before making any financial order as part of the sentence.[680] There are some financial orders which can be ordered to be paid out of the confiscation order if the court finds that the defendant cannot pay both confiscation order and the other order,[681] otherwise the confiscation order must not be taken into account when sentencing the defendant.[682]

Under POCA 2002 all confiscation orders must be made at the Crown Court and conditions apply.[683] The defendant must have been convicted of a criminal offence in the Crown Court or been committed for sentence from the magistrates' court. Following a guilty plea or conviction in the magistrates' court, the prosecutor will apply to the magistrates' court to commit the case to the Crown Court and if it does, the court must commit for sentence.[684]

The Crown Court must either be invited to consider a confiscation order by the prosecutor or believe that it is appropriate to consider the order.[685] The court will then decide whether the defendant has a criminal lifestyle and if so whether he had benefited from that criminal lifestyle. A criminal lifestyle is defined in the Act[686] and is either an offence listed in

[679] POCA 2002, s 14. The period of postponement can be for up to 2 years or longer if there are exceptional circumstances.
[680] POCA 2002, s 13.
[681] These orders are a compensation order made under the PCC(S)A 2000, s 130; a victim surcharge order made under the Criminal Justice Act 2003, s 161A; an unlawful profit order made under the Prevention of Social Housing Fraud Act 2013, s 4; and a slavery and trafficking reparation order made under the Modern Slavery Act 2015, s 8. The power is contained in POCA 2002, s 13(3A).
[682] POCA 2002, s 13(4).
[683] POCA 2002, s 6.
[684] The power to commit for sentence also applies to summary only cases and in the Youth Court. There is also a power to commit other offences for sentence at the same time. POCA 2002, s 70.
[685] POCA 2002, s 6(3).
[686] POCA 2002, s 75.

schedule 2 to the Act or fulfils the other criteria.[687] If the defendant does not have a criminal lifestyle, the court will decide whether he had benefited from his particular criminal conduct.[688] If the defendant has benefited from his crime then the court will decide his benefit on the balance of probabilities.[689]

If the court has decided that the defendant has a criminal lifestyle, it must make four assumptions when deciding his benefit.[690] The first is that any property transferred to the defendant at any time after the relevant day[691] was obtained by him as a result of his general criminal conduct and at the earliest time he appears to have held it. The second is that any property held by him at any time after the date of conviction was obtained by him again as a result of his general criminal conduct and at the earliest time he appears to have held it. The third is that any expenditure incurred by him after the relevant day was from property obtained by him as a result of his general criminal conduct, and the fourth assumption is that for the purposes of valuing his property he obtained it free of any other interests in it. The court is required to make these assumptions although the defendant can rebut them by showing that they are incorrect or there would be a serious risk of injustice if the assumption is made.[692] If the court does not make one or more of the required assumptions it must state its reasons.[693]

Once the benefit figure has been arrived at, the court will determine the recoverable amount which is equivalent to the benefit figure.[694] However, if the defendant proves that

[687] These are contained in section 75 and are that the offence(s) constituted part of a course of criminal activity which means that the defendant has been convicted of three or more offences from which they have benefited, or they have been convicted of at least two offences over a six year period from which they have benefited. In both situations, the amount of the benefit must be at least £5000. The other ground is that the offence has been committed over at least six months and they have benefited from their crime.
[688] Which is defined in POCA 2002, s 76.
[689] POCA 2002, s 6(7).
[690] POCA 2002, s10(1)-(5).
[691] The relevant day is the earliest of either the first day of a period of six years ending with the day when the proceedings, or the first of the proceedings where there are two or more offences, were started. POCA 2002, s 10(8).
[692] POCA 2002, s 10(6).
[693] POCA 2002, s 10(7).
[694] POCA 2002, s 7(1).

the available amount is less than the benefit, the recoverable amount is the available amount or a nominal amount, if the available amount is nil.[695] There is no minimum amount of an order; and no matter what the value is, the magistrates' court is legally responsible for the order.

The burden is on the defendant to establish on the balance of probabilities that the realisable amount is less than the assessed benefit.[696] The European Court of Human Rights has agreed with the domestic courts that it was not incompatible with Article 6 to place the burden on the defendant of showing that the amount that might be realised was less than the amount assessed as his benefit. Only the applicants could have the knowledge and the burden on them would not be difficult to meet if their accounts were true. Once the confiscation order had been made properly under Article 6(1) of the ECHR there was no disproportionate violation of the right to peaceful enjoyment of possessions under A1P1.[697]

The law requires the prosecution to provide the court with a statement of information during the course of the confiscation proceedings[698] and the court may order the defendant to provide a statement in response.[699] It has been observed that a judgment would be defective if it did not indicate even briefly how the figures for the benefit and

[695] POCA 2002, s 7(2). Nominal orders are made where there is a benefit but few or no assets which means that the court can increase the order at a later date, Joint Thematic Review (n 3) 37. The provisions apply to 'realisable property' which is any free property held by the defendant; or any free property held by the recipient of a tainted gift. POCA 2002, s 83. The tainted gift provisions are necessary to ensure that those who have benefited from crime do not defeat the confiscation order by gifting assets. *R v Kim Smith* [2013] EWCA Crim 502, [2014] 1 WLR. 898; *Johnson* (n 16). A consideration of these provisions falls outside the scope of this thesis.
[696] *R v Summers* [2008] EWCA Crim 872, [2008] 2 Cr App R (S) 101.
[697] *Grayson and Barnham* (n 509).
[698] POCA 2002, s 16.
[699] POCA 2002, s 17. If the defendant fails to comply he may be treated as accepting the allegations in the prosecution statement except any allegation in respect of which he has complied with the requirement and any allegation that he has benefited from his general or particular conduct.

realisable assets were arrived at.[700] When the court decides the available amount, it must include a statement of the findings in the confiscation order.[701]

It is common for parties to agree figures to be put before the court for a confiscation order to be made.[702] This has been criticised when there has been no proper assessment of what assets are available to satisfy the order[703] or where it puts pressure on the prosecution to accept a compromise.[704] However the fact that orders were settled between the prosecution and the defence is seen as pragmatic by the judiciary[705] and a legitimate way of saving time and money by financial investigators.[706] In *Ghulam* the Court of Appeal has approved the practice as it can save court time and resources by identifying what proceeds can be recovered in practice and can also serve the wider public interest and prevent unsuccessful enforcement.

The judgment emphasised that even if the parties agree an order between them, it is for the court to determine what the appropriate order is.[707] Even though the practicalities of the system are that parties will agree orders to put before the judge, it is recommended that all agreements should also include an assessment of how the order is to be satisfied so the judge can make any other orders necessary. This is necessary in practice to

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[700] *R v Summers* (n 696).
[701] POCA 2002, s 7(5). It is this provision which means that assets are identified, but also permits the court to determine that the defendant has 'hidden assets' that cannot be identified but should be used to satisfy the confiscation order. The expression is indicative of the fact that the prosecution can have no means of knowing where the assets are or how they have been disposed of, *R v Barnham* [2005] EWCA Crim 1049, 1 Cr App R (S) 16 [41]. This determination can also cause difficulties for the magistrates' court when enforcing a confiscation order, Payback Time (n 173) 12. This is because the very nature of them means that the defendant has not demonstrated the availability of assets, and the Crown Court has been bound to make an order in the total recoverable amount. In fact, Wood suggested that the term 'hidden assets' was a misnomer as sometimes there are no assets to satisfy the order, Wood, Enforcing Criminal Confiscation Orders (n 2) 11-12. A good example of a misnomer, this area falls outside the scope of this thesis.
[702] *R v Ghulam* [2018] EWCA Crim 1691, [2018] Crim LR 926. The fact that orders were settled between the prosecution and the defence was seen as pragmatic by the judiciary interviewed by Bullock and others (n 29) 16.
[703] Joint Thematic Review (n 3) 40-41.
[704] Bullock and others (n 29) 16.
[705] ibid 16.
[706] Bullock, 'Criminal Benefit' (n 53) 61.
[707] *Ghulam* (n 702) [21].

ensure that the magistrates' court can identify which assets are available to satisfy the confiscation order.

3.6.1 Imposition: *Waya*

The SCA 2015 introduced a change to section 6 POCA 2002 brought about because of the case of *Waya*[708] in which the Supreme Court decided that if an order for the defendant to pay a confiscation order would be disproportionate then the court should make an order in a reduced amount or not at all.

In *Waya*, the Supreme Court considered whether the amendments made by POCA 1995 to the powers of confiscation (which were reproduced in POCA 2002), were proportionate. The amendment considered was the removal of almost all discretion from the Crown Court to make a confiscation order or on the question of quantum, if the relevant statutory provisions had been established. It also considered whether the calculation of benefit provisions could in some circumstances be a contravention of Convention rights, noting that this question had not arisen before in cases in the Strasbourg court.[709]

In some ways, the case turned on its own facts as it concerned a mortgage fraud when part of the purchase was funded by legitimate funds. The majority decision was that the purpose of a confiscation order was not to act as a deterrent by imposing a further punishment but to deprive a criminal of the proceeds of his crime. A1P1 of the ECHR required that the deprivation of property as a penalty had to be proportionate to the legitimate aim, which was to remove from criminals the pecuniary proceeds of their crime, the deterrent effect was secondary. As a result, a confiscation order should not be disproportionate to the benefit that a criminal derived from his criminal activity, although this did not allow a general judicial discretion, and the judgment made it clear that a general discretion as existed in the CJA 1988 before it was amended by POCA 1995 was not being re-introduced. The judgment and the subsequent amendment to section 6 of

[708] *Waya* (n 125).
[709] ibid [5].

POCA 2002 means that if an order for the defendant to pay the recoverable amount would be disproportionate then the court should make an order in a reduced amount or not at all.[710]

In a number of articles Dyer and Hopmeier considered the impact of *Waya* on the imposition of confiscation orders.[711] They anticipated that the fact that the judgment created a need to consider the defendant's A1P1 rights when making a confiscation order as having 'far-reaching significance'.[712] By the third article however, they suggested that little has changed in the way that the POCA legislation is applied when imposing a confiscation order, although they identified that the more significant impact of *Waya* is the effect on the repayment of the order.[713] Their comments related to the impact of the judgment on repayment in relation to cases where the defendant had already made full restoration to a victim[714] however, the impact of *Waya* has been felt by the magistrates' court as it led to the judgment of *Ahmad and Ahmed* which has implications for the enforcement of magistrates' court.

3.6.2 Imposition: *Ahmad and Ahmed*

In a case where there is more than one defendant the Crown Court now has to determine whether both defendants have received the same benefit. If so both the Crown Court and the magistrates' court are bound by the decision in *Ahmad and Ahmed*.[715] In this case there were two defendants and the benefit figure was £16.1 million. The question the Supreme Court considered was whether the confiscation order should be £16.1 million against each defendant or £8.05 million each. The Supreme Court followed the existing case law and said that any confiscation order should be £16.1 million against each

[710] POCA 2002, s 6(5) was amended by SCA 2015, sch 4, para 19.
[711] Polly Dyer and Michael Hopmeier, 'Confiscation: Waya and other recent developments' (2013) 1 Arch Rev 7; Polly Dyer and Michael Hopmeier, 'Confiscation: Waya and other recent developments' (2013) 2 Arch Rev 6; Polly Dyer and Michael Hopmeier, 'Keeping "proportionality" in proportion: an update on Waya and confiscation' (2014) 2 Arch Rev 6.
[712] Dyer and Hopmeier, 'Waya and other recent developments Part 1' ibid 7.
[713] Dyer and Hopmeier, 'Keeping "proportionality" in proportion' (n 711) 6.
[714] ibid 6-7.
[715] *Ahmad and Ahmed* (n 12).

defendant, but that it would be disproportionate and contrary to A1P1 for the State to take the same amount twice in relation to the same benefit.[716] It accepted that the appropriate way to prevent any violation of A1P1 would be the use of a proviso in the confiscation order.[717] Therefore, where a finding of joint obtaining is made, whether against a single defendant or more than one, a confiscation order should be made for the whole value of the benefit obtained, but should provide that it is not to be enforced to the extent that a sum has been recovered by way of satisfaction of another confiscation order made in relation to the same joint benefit.[718]

The court considered the implications of the decision on the enforcement of a confiscation order, noting that the decision may appear to produce inequity between defendants, as one of them may 'obtain a windfall' if another pays the order. However, the judgment explained that is 'an inherent feature of joint criminality' explaining that if joint conspirators were sued by a victim, and judgments obtained, then the victim would be entitled to enforce the judgment against whichever defendant he most easily could. The court commented that: 'The losses must lie where they fall, and there is nothing surprising, let alone wrong, in the criminal courts adopting that approach'.[719]

Although the Lords hailed the simplicity of the decision, the implications for the enforcing magistrates' court were not considered. This is the first time that joint and several liabilities for a confiscation order has been identified as a suitable method of enforcement of a confiscation order. The method has previously been identified in relation to other financial penalties but discouraged because of difficulties with enforcement.

The Court of Appeal held in 1967 that a trial court is not concerned about matters between defendants on the enforcement of a joint and several order for costs[720] and therefore there is no objection to a 'joint and several' order against a number of defendants in relation to

[716] ibid [72].
[717] ibid [71].
[718] ibid [74].
[719] ibid [73].
[720] *R v Simmonds and others* [1969] 1 QB 685 (CA) [697] (Fenton Atkinson J).

an order for prosecution costs order. In 1974 the same court held that although such orders were permissible, and within the spirit and intention of the compensation provisions, they were not to be made if substantial justice could be achieved by orders made severally.[721] The main reason given by Widgery LCJ for not making a joint and several order was the practical and administrative complications which might arise in the enforcement by one or more magistrates' courts. At that time, one or more justices' clerks[722] could be looking after the accounts who would have to liaise constantly and there would be a danger in obtaining a sum greater than they are jointly and severally responsible to pay. Widgery LCJ held that there must be some regard to the practicability of making such an order work.[723]

In *Ahmad and Ahmed*, the Supreme Court changed the enforcement of joint benefit cases, not only by clarifying that more than one recovery cannot be made in respect of the same benefit, but also by introducing the concept of joint and several orders in confiscation. The intention of the decision was to provide clarity and predictability in relation to a procedure that was 'inherently difficult.[724] The consequences for the enforcing magistrates' court are not so simple, including the need to calculate and re-calculate the co-defendants default sentences.[725] This means that in this case, which concerned two defendants and a confiscation order in the sum of £16.1 million, if defendant 1 paid £12.6 million, the magistrates' court could only enforce £3.5 million but that could be enforced against either defendant.

In construing POCA 2002, the court took into account the aim of the confiscation legislation, which is to recover assets obtained through criminal activity both because it was wrong for criminals to retain the proceeds of crime but also because it was necessary

[721] *R v Grundy* [1974] 1 WLR 139 (CA).
[722] Now designated officers, n 22.
[723] *Grundy* (n 721) 141F.
[724] *Ahmad and Ahmed* (n 12) [40].
[725] David Winch, 'Supreme Court Caps Confiscation Enforcement' <http://www.accountingevidence.com/blog/2014/06/supreme-court-caps-confiscation-enforcement/> accessed 14 March 2016.

to show that crime does not pay.[726] However, the Supreme Court also highlighted the need for practicality in ensuring that the 'recovery process in identifying, locating and confiscating the relevant assets was as simple, predictable and effective as possible'[727] because of the difficulties in the process.[728]

Ahmad and Ahmed confirmed that the defendant's A1P1 rights extended beyond the imposition of confiscation orders as in *Waya*, to the enforcement of them. Undoubtedly this must be the correct position and is an example of the judiciary balancing the rights of the defendant with the nature and purpose of the regime. It also addresses Lawrence's criticism of the Act in one regard. He opined that the fact the same amount could be collected more than once in joint benefit cases was draconian and contrary to A1P1. He was doubtful whether the point would be argued at the ECHR or whether the court would come to the right decision.[729] His views on the application of A1P1 were justified, but in fact it was sufficient for the Supreme Court to consider it and ensure compliance.

However, *Ahmad* gave no consideration to the problems on enforcement for the magistrates' court. The decision adds to the already complex provisions without adding to the powers of the magistrates' court and adds weight to the need to review the power available to the magistrates' court to enforce a confiscation order.

Dyer and Hopmeier's article on *Ahmad and Ahmed* suggested more caselaw would follow[730] and there has been some on the impact on the imposition of a confiscation order.[731] However, the impact of the decision on this research is on the use of the proviso. This was considered in *R v Dad*[732] which involved three co-defendants and it

[726] *Ahmad and Ahmed* (n 12) [38].
[727] ibid [38].
[728] ibid [36].
[729] Lawrence (n 667) 23.
[730] Polly Dyer and Michael Hopmeier 'Ahmad and Fields-clarification by the Supreme Court or a precursor to more litigation? Recent developments on restraint and confiscation' (2014) 10 Arch Rev 6.
[731] Namely where there is joint benefit the order should be made in the whole amount, for example *R v Harvey* [2015] UKSC 73, [2017] AC 105.
[732] [2014] EWCA Crim 2478. The question of apportionment considered in the case falls outside of the scope of this thesis.

considered the form of the confiscation order, and therefore the implications for enforcement. It held that following *Ahmad and Ahmed* the Crown cannot make more than one full recovery in respect of the same joint benefit as a matter of law which means that enforcement proceedings can 'be resisted' on that basis.[733] It also held that the enforcement stage is the place to decide any subsequent issues, for example, the unlikely scenario where one of the defendants has a lottery win.[734] It was made clear that there is no need for a proviso in every confiscation order however if there is a need, care should be taken when drafting the order and the order should record the extent of any sole and joint benefit.[735]

In a commentary on *Dad*, Fortson was concerned that an absence of a proviso would cause difficulties, as the principles in *Ahmad* apply whether or not the order contains a proviso. The author felt a bespoke proviso would be of benefit and it would be 'regrettable if the inclusion of a proviso became the exception rather than the norm.'[736] It is the experience of the research author that orders involving joint benefit have a proviso but this does not make the enforcement of orders any easier. Any difficulties with enforcing against an asset where there is a single defendant are merely multiplied where there is more than one defendant. It is essential to the magistrates' court that the order made at the Crown Court is recorded clearly and sent to the magistrates' court along with the schedule of assets.

Given the need to ensure proportionality in the regime, it is understandable that the Joint Committee on Human Rights enquired whether the Serious Crime Bill should be amended to give clear effect to the decision of *Ahmad and Ahmed,* which the government said it would review,[737] but there was no relevant provision in the SCA 2015. It is difficult to see

[733] ibid [56] (Davis LJ).
[734] ibid [58].
[735] ibid [56], [59].
[736] Fortson (n 61) 359.
[737] Joint Committee on Human Rights, *Legislative Scrutiny: (1) Serious Crime Bill, (2) Criminal Justice and Courts Bill (second Report) and (3) Armed Forces (Service Complaints and Financial Assistance) Bill* (2014–15, HL 49, HC 746) 1.24-1.25.

what legislative amendment could be included, as the amendments to section 6 following *Waya* already require any confiscation order to be proportionate and the case law has established that the magistrates' court can only collect the benefit once.

Young correctly identified that the confiscation legislation in the UK contains in-built mechanisms of proportionality.[738] In POCA 2002, proportionality is achieved by the amendments to section 6 following *Waya*. His article concentrates on proportionality at the imposition stage and in the use of restraint, but when considering the impact of *Ahmad and Ahmed* he identified a specific form of proportionality namely that if all co-defendants were ordered to pay the full amount of the benefit then that would be disproportionate to the gravity of the offence reflected in the total benefit obtained.[739] This is precisely the approach taken in the case of *Dad* which followed *Ahmad and Ahmed* and held that there is no multiple recovery and no breach of a defendant's A1P1 rights until the full benefit is paid off.[740]

The changes because of *Ahmad and Ahmed* and *Waya* along with the subsequent change to section 6 POCA 2002 were viewed as positive by Wood. She hoped they would mean that the setting of confiscation orders would be at a more realistic level which should make enforcement easier although she commented that it is not the role of judges to consider the practicalities of the enforcement of confiscation orders but to interpret the law as it is intended by Parliament.[741]

In practice, it would cause more difficulties for the magistrates' court if judges do not consider the practicalities of enforcement. The Court in *Ahmad and Ahmed* emphasised the need for the system for locating and seizing assets to be as simple and effective as

[738] Simon N M Young, 'Disproportionality in Asset Recovery: Recent Cases in the UK and Hong Kong' in Colin King, Clive Walker and Jimmy Gurulé, (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law'* (Palgrave Macmillan 2018) 474. He explains that a confiscation order is capped at the available amount even if the benefit figure is higher.
[739] ibid 478.
[740] *Dad* (n 732) [58].
[741] Wood, The Big Payback (n 5) 11.

possible[742] which, it is argued, should be a consideration for the Crown Court judge. Wood's paper focuses more on the enforcement of confiscation orders using restraint and receivers and considered the role of the CPS rather than the practical difficulties for the magistrates' court enforcing confiscation orders. This may explain her conclusion which is out of step with the views of others and is the opposite of the one stop shop approach envisaged by the introduction of POCA 2002. The Working Group First Report took the opposite view to Wood and recommended that the Crown Court should become more involved in the enforcement process by identifying how a confiscation order should be enforced[743] as did the PIU Report.[744]

The Crown Court already considers the enforcement of confiscation orders when making orders such as restraint and compliance restraint orders, and Hopmeier and Mills with their practical experience in the Crown Court explain the need for the Crown Court to consider making an enforceable order.[745] It is suggested that, contrary to Wood's view, practicalities of enforcement should be considered on imposition, and it is this view which should be preferred.

However, the principle in *Ahmad and Ahmed* adds further complications to the already complex provisions for the magistrates' court. The recommendations in this thesis for the Crown Court powers to be extended to make payment orders and charging orders would create the change of focus needed to help the magistrates' court where the asset is a house or money in a bank account, and would allow judges to ensure that their orders are enforced more effectively.

3.6.3 Role of the Crown Court

When making a confiscation order the Crown Court will grant a period of time for payment and fix a period in default which the defendant is liable to serve if the order is not paid

[742] *Ahmad and Ahmed* (n 12) 38.
[743] Working Group First Report (n 137) 8-9.
[744] PIU Report (n 117) 71.
[745] Hopmeier and Mills (n 675) 458.

within that time, and the default term will be consecutive to any custodial sentence imposed for the offence the confiscation order relates to. The Crown Court can also make a restraint order restraining the defendant and third parties from dealing with property. This may all sound straightforward but there are difficulties with the process. The confiscation order is made in a financial amount and sent to the magistrates' court for enforcement. Despite the fact that assets are identified, the defendant does not need to use those assets to satisfy the order, and unless there is a restraint order, there are limited ways of preventing dissipation. The enforcement of confiscation orders by the magistrates' court comes at the end often with considerable delay between the start of the criminal proceedings and the time the magistrates' court can enforce a confiscation order.[746]

Over the years issues have arisen relevant to this process and it is essential that all the relevant information about the confiscation order is entered by the Crown Court onto a form called form 5050 and any assets are listed on form 5050A. These are sent to the magistrates' court to give it all the information it needs to enforce the order. Because of the nature of the confiscation order there is no need for the defendant to use assets identified at the Crown Court to satisfy the order, and it may well be that other assets will be identified as available to satisfy the order during the enforcement process, but if the defendant does not pay as ordered, the magistrates' court needs to know which assets were identified at the Crown Court.

The use of these forms has addressed concerns in the review documents that magistrates' courts were not receiving information about assets identified at the Crown

[746] A confiscation order can now only be made in the Crown Court. There may have been a delay before charging the defendant, and the nature of criminal proceedings means there will be some delay before the defendant pleads guilty or is convicted after a trial. The court can postpone for up to two years from the date of conviction or longer if there are exceptional circumstances, POCA 2002, s 14. The length of time taken to satisfy orders has been identified as an issue by Payback Time (n 173) 48 and Local to Global (n 224) 19.

Court.[747] Although there have been improvements, more can be done[748] and the importance of filling out the forms correctly was emphasised in *Ghulam*[749] which shows that there are still issues which need to be addressed.

The case emphasised the need for forms 5050 and 5050A to be completed with care especially when there is a question about whether there is a need for the Crown Court to decide whether to make a determination in relation to a third party's interest in property.[750] Given the nature of the proceedings and the previous issues, it is the experience of the research author that it is important that they are completed in all cases including cases involving joint benefit like *Ahmad and Ahmed* and are essential for the recommendations in this research.

3.6.4 Changes to POCA 2002 made by the Serious Crime Act 2015

The amendments to POCA 2002 made by the SCA 2015 include creating new powers for the Crown Court to make a compliance order,[751] or a determination as to the defendant's share in property (a section 10A determination).[752]

[747] The Working Group Third Report also recommended that the Crown Court judge should notify the magistrates' court which assets had been taken into account when identifying a defendant's benefit and felt that a standard form, which should identify the prosecutor, should be introduced for this purpose. They also recommended that a copy of the prosecutor's statement should be sent to the enforcing court to assist with enforcement, Working Group Third Report (n 126) paras 2.12-2.14. A report in 2010 found that issues about the quality of timeliness of paperwork from the Crown Court caused issues for RCU staff with enforcement, because, for example, insufficient information about assets, Joint Thematic Review (n 3) 43. The NAO found that much of the success in enforcing confiscation orders is started during the preparation of the case, NAO Report (n 71) 29.

[748] By 2004 staff in magistrates' courts and Crown Courts were working together better and recognised the importance of all agencies working together. Although there were still some examples of delays in sending paperwork from the Crown Court it was expected this would reduce, Payback Time (n 173) 82. By 2013 the NAO reported error rates in the North East Region of 6% from Financial Investigators and 15% from Crown Courts, The NAO Report (n 71) 40. However, the PAC also highlighted errors in the information sent to enforcement units which it concluded reduced enforcement rates, PAC Report (n 328) 4, 12.

[749] *Ghulam* (n 702) [89].

[750] ibid [91].

[751] The new sections 13A and 13B POCA 2002 were inserted by SCA 2015, s7.

[752] POCA 2002, s 10A.

A compliance order is an order which the Crown Court *must* consider on imposition or at a later date on the application of the prosecutor.[753] The power echoes the pre-existing power for the Crown Court to make an order it considers appropriate to ensure that a restraint order is effective.[754] It can be made against the defendant or a third party and can include any restrictions, prohibitions or requirements necessary to ensure compliance with the confiscation order, but the Crown Court must consider travel restrictions on the defendant which would prevent him travelling outside the UK when it is considering whether to make the order.[755] A compliance order is defined in the Act as an order the Crown Court may make if it believes it is '*appropriate* for the purpose of ensuring that the confiscation order is effective'.[756]

Only one case has been reported on the use of compliance orders,[757] which was an appeal on the making of a compliance order with travel restrictions. The relevant part of the judgment for this thesis is that it was held that the use of the word 'appropriate' in section 13A(2) is not a synonym for 'necessary'. The Court agreed with the Explanatory Notes to the SCA 2015 that section 13A POCA 2002 is akin to the restraint order powers[758] and held that the word 'appropriate' required no gloss. However, a compliance order must be justified.[759]

Fisher describes the power as a 'potentially far-reaching innovation' and envisages other uses of a compliance order and gives the example of compelling the defendant to deal with his property in a particular way, for example by requiring the defendant to transfer monies in an offshore bank account to a local bank account.[760] Using compliance orders in this way could make a practical difference to the enforcement of confiscation orders, for

[753] POCA 2002, s 13A(3); emphasis added.
[754] POCA 2002, 41(7) provides that the court may make such order it believes is appropriate for the purpose of ensuring that a restraint order is effective; emphasis added.
[755] POCA 2002, s 13A(4).
[756] POCA 2002, s 13A(2); emphasis added.
[757] *R v Pritchard* [2017] EWCA Crim 1267, [2018] 1 WLR 1631.
[758] Explanatory Notes to the Serious Crime Act 2015, para 46.
[759] *Pritchard* (n 757) [34].
[760] Fisher (n 60) 759.

example, if a compliance order is used as Fisher describes it would allow a payment order to be made.

There is another area where a compliance order could be used, to make a practical difference to enforcement, namely where a house has been identified as an asset. It could be used to require a defendant to market a house for sale, for example, within a certain timeframe, with a requirement to provide proof to the lead agency at named intervals. As a compliance order can be made against a third party the order could require any estate agent to provide details of whether the house is being marketed at an appropriate price, how many viewings have been undertaken and whether any offers have been made. The estate agent could also be required to give an opinion about whether any offers are reasonable. This would assist the magistrates' court if the house has not been sold before time for payment has expired as it would need to make a decision about whether it is reasonable to adjourn the enforcement hearing to allow the property to be marketed further before activating the default term. The use of compliance orders in this way would fit in with Wood's conclusion that such orders could be used innovatively to impact on levels of payments, a view which was supported by her interviewees,[761] and also the view of Hopmeier and Mills who see the broad discretion to make this order an invaluable tool to ensure enforcement of confiscation orders.[762]

The other relevant amendment to POCA 2002 by SCA 2015 is the introduction of section 10A POCA 2002 which is a new power for the Crown Court to determine a defendant's share in property on the making of a confiscation order. The changes mean that now the Crown Court has the power to determine the amount of the defendant's assets, including the extent of any interest in a house or bank account which in turn has the effect of determining the extent of a third party's assets. For example, if a defendant and spouse claim that the defendant only owns 20 per cent of a property and the court determines the

[761] Wood, The Big Payback (n 5) 7.
[762] Hopmeier and Mills (n 675) 461.

defendant's share as 50 per cent; then the decision means that the third party's share is 50 per cent and not 80 per cent as claimed by the parties.

Once the Crown Court has made a determination under section 10A about the defendant's assets it is binding on the third party, the receiver and any future court determining the realisation of the property or the transfer of the interest in it with a view to satisfying the confiscation order.[763] As a result the Crown Court must now give the third party the opportunity to make representations at the determination stage[764] rather than later and can now order a third party to provide any information to decide what the defendant's share in any asset is.[765] If the third party does not provide the Crown Court with the necessary information then the Crown Court can draw an inference as to the share of the defendant (and the third party)[766] and could hold the third party in contempt.[767] Any information given by the third party is not admissible in criminal proceedings,[768] and this safeguard meant that the Joint Committee on Human Rights found that the provision is compatible with the right against self-incrimination contained in Article 6 of the ECHR.[769]

The introduction of section 10A of POCA 2002 is relevant for a number of reasons. It is an example of a change to POCA 2002 which fits in with the one stop shop policy of the

[763] The rights of third parties to make representations when an enforcement receiver has been appointed still apply where the court has made a determination under section 10A POCA 2002 but these rights are limited to two situations, firstly if the third party was not given a reasonable right to make representations and has not appealed; or if there was a serious risk of injustice if the court was bound by the determination, POCA 2002, s 51(8B) as inserted by SCA 2015, s 4. A third party also has the right to be heard on an appeal POCA 2002, s 10A(4).
[764] POCA 2002 s 10(2). In order for the Crown Court to make a determination under s 10A, further amendments were made to POCA 2002 to provide for strengthened powers for the Crown Court to consider information. As a result of the amendments in sections 16 and 18; and the new section 18A POCA 2002, the prosecutor and defendant and now third parties must provide the court with the necessary information to allow a determination under section 10A to be made, with the power for the court to draw inferences. The powers of an enforcement receiver are contained in s 51 POCA 2002 and allow a third party to make representations to the court where a determination has been made under section 10A POCA 2002.
[765] POCA 2002, s 18(2).
[766] POCA 2002, s 18A(4).
[767] POCA 2002, s 18A(5).
[768] POCA 2002, s 18A(9).
[769] Joint Committee on Human Rights, Serious Crime Bill (n 737) paras 1.26-1.27.

Act by moving decisions in relation to third parties to the Crown Court on imposition. The changes show that the Crown Court can make decisions in relation to assets including bank accounts and houses when imposing a confiscation order. It is therefore submitted that it would only be a small step for the Crown Court to then make a payment order or confiscation charging order on imposition as well.

Determinations under s 10A are new with no detailed guidance on its application.[770] Its effect remains to be seen[771] but there have been cases considering its use which gives some indication of the sort of cases that could be subject to a determination under s10A POCA 2002 and where necessary a confiscation charging order could be made. The Explanatory Notes to the SCA 2015 explained that the Crown Court would determine those rights in relatively straightforward cases[772] which is what happened in *R v Taylor.*[773] The third party interests related to one property, there was only one third party (the spouse), and there were no disputes of primary facts. In addition, the issue was about the amount of the beneficial interest in the matrimonial home, the third party was not aware of her husband's criminal activities and therefore her interest in the matrimonial home was not tainted in that way. As there was no issue of divorce, there were no issues under the Matrimonial Causes Act 1973 to consider.

Courts have also held that the section can be used to decide if a defendant could have a greater or lesser share of the matrimonial property than claimed but that an estranged husband or lender should be given the opportunity to make representations before making a decision.[774] It can also be used to determine whether properties were held on trust by sons on behalf of their father.[775]

[770] *Ghulam* (n 702) [90].
[771] Hopmeier and Mills (n 675) 450.
[772] Explanatory Notes to the Serious Crime Act 2015, para 21.
[773] Manchester Crown Court, 9 February 2017.
[774] *R v Hilton* [2017] NICA 73. This case considered section 160A POCA 2002 which applies in Northern Ireland and is the equivalent to s 10A.
[775] *Ghulam* (n 702).

A determination made under section 10A POCA 2002 means that if there is a later application in any court, for example, an application for a restraint order in the Crown Court, or charging order in the county court, then the court hearing the application would be bound by the initial determination of the Crown Court. Again, it is submitted that this adds weight to the recommendations in this thesis. As the Crown Court would be hearing from the defendant and the third party, or drawing inferences if the third party does not comply with an order to provide information to the Crown Court, determining the rights of the third party under section 10A POCA 2002, the Crown Court should then go on to make either a confiscation charging order or a payment order if relevant as an alternative to restraint. However, as orders including restraint orders can be made at the Crown Court after imposition, it is recommended that a s 10A determination should be available to the Crown Court at any stage on or after imposition on the application of the prosecutor, like a compliance order.

Hopmeier and Mills identify that when dealing with s 10A determinations third parties involved may be companies or spouses. This means that Crown Court judges may need to have a detailed knowledge of company law or the provisions of the Matrimonial Causes Act 1973 and may have to adjourn confiscation proceedings pending the outcome of family proceedings.[776] This research cannot cover all the issues in relation to confiscation and a detailed review of these areas would not impact on the recommendations made. It would however be a useful topic for further research, particularly in relation to charging orders if the asset is the matrimonial home.[777]

3.7 Conclusions of chapter

The regime is acknowledged as draconian, but there are balances to protect the defendant. A less draconian option can be chosen if there is one available, and one of the

[776] Hopmeier and Mills (n 675) 451.

[777] Further research should also consider similarities to contract law and applications to set aside a legal charge due to claims of undue influence or misrepresentation by a spouse who claims this is why they entered into a credit agreement using the matrimonial home as a security, Richard Stone and James Devenney, *The Modern Law of Contract* (12th edn, Routledge 2017) 369-380.

balances in the system is the protection of the defendant's human rights. The principles that can be taken from the case law in relation to the ECHR are that Article 6(2) has no application to confiscation order proceedings, but the rest of the article applies, as does A1P1. If the confiscation order is compliant with the ECHR then its enforcement can be. The Supreme Court in *Ahmad and Ahmed* identified difficulties with locating and recovering assets and that the confiscation of relevant assets should be as simple, predictable and effective as possible. However, the decision has added a further layer of complexity to the enforcement of confiscation orders. POCA 2002 was an attempt to simplify the legislation but has required amendment on a number of occasions, and there are still issues on enforcement which the legislation has failed to address.

Getting the order right on imposition is important for enforcement and it is recommended that Crown Court judges should consider the enforcement of the confiscation order when it is made and that all the information in the possession of the Crown Court should be put on the relevant forms to aid the magistrates' court enforcing the order. However, the nature of a confiscation order means that it is a financial order and the defendant does not have to use those assets to satisfy the order without a further order of a court.

The confiscation order legislation has developed in a piecemeal fashion over many years which has added to the complexity of the magistrates' court enforcing an order. However, the fines based powers have not changed and have not been used for the type of cases envisaged when the regime was introduced. There is also a lack of certainty about the purpose of the legislation, and it is suggested this is connected to the difficulties in assessing the success or otherwise of confiscation orders. As a result, the recommendations in this thesis have to meet a number of purposes. There is an important need to ensure a court order is enforced in all cases, there is a focus on collection rates and now also disruption and it is suggested that the recommendations in this thesis should also be judged against the purpose of POCA 2002 to create a one stop shop in relation to confiscation at the Crown Court.

There are two new changes to POCA 2002 made by the SCA 2015 which can be made on the imposition of a confiscation order. A compliance order could be used innovatively to support the recommendations in this thesis for the Crown Court to make a confiscation charging order, and for the extension of the payment order provisions. The Crown Court can now also make a determination on the defendant's share in property when determining the amount of a confiscation order. This determination will be binding on future proceedings to determine the realisation of the property or the transfer of an interest in it with a view to satisfying the confiscation order. If the third parties are not given the opportunity to make representations on a section 10A POCA 2002 determination, the order will be quashed. It is recommended that as well as these new powers, the Crown Court should also be able to make a confiscation charging order or payment order.

Chapter 4 The Enforcement of Confiscation Orders: Restraint and charging orders made under the confiscation legislation

4.1 Introduction

The two questions posed by this thesis are, firstly, how has the confiscation legislation developed in relation to the enforcement of confiscation orders in the magistrates' court? Then, secondly, what future legislative amendments might assist the enforcement of confiscation orders by the magistrates' court and create an alternative to restraint? In order to answer the second question it is necessary to review the law of restraint, and the power to make a charging order in the pre-POCA 2002 legislation.

Powers are essential to prevent defendants dealing in property so it is not hidden, dissipated or removed from the jurisdiction[778] and both a restraint order and a charging order preserve property.[779] Assets are not taken from the defendant without the appointment of a receiver, or in addition for charging orders, an application for an order for sale. As a result, one of the most basic issues with restraint is that any assets which are restrained do not satisfy the confiscation order unless they are either released by the defendant, an enforcement receiver is appointed or the magistrates' court takes an enforcement action.

The power to make a restraint order existed in the pre-POCA 2002 legislation and continued in POCA 2002 although the power has subsequently been amended. The charging order powers which existed in the pre-POCA 2002 legislation did not survive when POCA 2002 was enacted. A charging order under the pre-POCA 2002 legislation is an alternative to restraint and a restraint order still cannot be made in relation to any property subject to a charging order made under the confiscation legislation. Therefore, a

[778] Home Office Guide (n 4) 13.

[779] Sutherland Williams, Hopmeier and Jones only mention restraint (n 58) 69*; Mitchell Taylor and Talbot* mention both restraint and charging orders vol 1, para 3.063 (R0: February 2002). Gentle, Spinks and Harris (n 491) 7.

restraint order cannot be made under POCA 2002 on the property if there is a charge made under one of the pre-POCA 2002 Acts.[780]

At the heart of this thesis is an analysis of the enforcement powers of the magistrates' court with the aim of identifying improvements and the conclusion that there is a need for alternatives to restraint including the power for the Crown Court to make a charging order. The practical experiences of the research author meant she was aware of the power for the designated officer for the magistrates' court to make an application for a charging order in the county court to enforce a confiscation order, and was intrigued to discover the power existed for the High Court to make a charging order in the pre-POCA 2002 legislation. In order to compare both charging order provisions it is necessary to analyse the powers to make a charging order within the confiscation proceedings in this chapter, which will later be compared to the powers available to the magistrates' court.[781]

Both the Proceeds of Crime Bill Draft Clauses and the Explanatory Notes to POCA 2002 refer to the power for the High Court to make a charging order being 'abolished' when POCA 2002 came into force.[782] In reality what happened is that POCA 2002 did not contain a power to make a charging order, but the power for the High Court to make a charging order still exists for any confiscation order made under the pre-POCA 2002 legislation.[783] A charging order could still be made as confiscation orders are being made and enforced under the pre-POCA legislation, although the research author is unaware of these applications being made by the prosecutors in practice.

Both restraint orders and charging orders are considered as a method of enforcing confiscation orders in this thesis despite the fact that the term could be considered as a misnomer. This is due in part to the fact that like a confiscation order, a restraint order is

[780] POCA 2002, s 41(8).
[781] The comparison is done in chapter 7, text to n 1492-n 1501.
[782] *Proceeds of Crime Bill: Publication of Draft Clauses* (n 31) para 2.13. Explanatory Notes to the Proceeds of Crime Act 2002, para 87.
[783] The Proceeds of Crime Act 2002 (Commencement No 5, Transitional Provisions, Savings and Amendment) Order 2003, SI 2003/333, art 10.

made against the person, not the property and does not create any right in the property.[784] Put simply, the Home Office described a restraint order by explaining that 'Property itself is not restrained; rather, a person is "restrained", by order of the court from dealing with it.'[785] A restraint order will usually name the defendant, although it will prevent 'any other person' dealing with realisable property.[786] They are temporary orders[787] which preserve property[788] and the assets often stay in the possession of the defendant unless there a receiver is appointed.[789] They can last a long time[790] and are 'essentially a means to an end, the end being the satisfaction of a confiscation order which may be or has been made'.[791]

Despite the idea that a restraint order as an enforcement action is a misnomer, restraint is seen by the review documents and practitioners as an effective tool for enforcing confiscation orders which has a significant impact on the overall success of enforcement.[792] Therefore it is considered as one of the methods of enforcement in this research. However, a restraint order can only be effective if it is made and this chapter will show that there are issues with the order and a perceived reluctance to make restraint orders because of the costs involved. There have been other issues with the orders since the power was first introduced, and not all of them have been addressed despite changes

[784] *Mitchell Taylor and Talbot* vol 2 para III.051 (R6: April 2005).
[785] Home Office Guide (n 4) 13.
[786] Sutherland Williams, Hopmeier and Jones (n 58) 25.
[787] Young (n 738) 472.
[788] Sutherland Williams, Hopmeier and Jones only mention restraint (n 58) 69*; Mitchell Taylor and Talbot* mention both restraint and charging orders vol 1, para 3.063 (R0: February 2002). Gentle, Spinks and Harris (n 491) 7.
[789] Bell (n 499) 785.
[790] *Lexi Holdings* (n 542) [83]. Months or years can elapse between the start of the investigation and the trial, Sutherland Williams, Hopmeier and Jones (n 58) 15. A confiscation order can be postponed for up to two years or longer after conviction, POCA 2002, s 14. The restraint order will stay in force until the order is paid in full or the order is discharged, POCA 2002, s 42 which could be years after imposition.
[791] *Lexi Holdings* (n 542) [8] (Keene LJ).
[792] Bullock et al found that orders with a restraint order were more likely to be paid than those without and this supported the views of the practitioners they interviewed that restraint was critical to the enforcement of confiscation orders. Bullock and others (n 29) 20-22. This was the finding of Wood based on her research, but she found that it was based on opinion not evidence. Wood, The Big Payback (n 5) 4.

in the legislation. Because charging orders were made rarely by the High Court, most of the issues relate to restraint orders. However, this chapter analyses both types of orders.

Restraint was still seen as a major issue by the Home Affairs Committee in 2016. A review of the 22 written submissions published by the Committee[793] shows that eleven mentioned restraint, with ten suggesting that there were problems with it and the recommendations of the Committee show that restraint was seen as a major issue which needed reform. This chapter will show that emphasis was placed on the number of restraint orders made.

Instead of concentrating on the number of restraint orders, this thesis has analysed the nature and scope of a restraint order and the appointment of a receiver. It considers the issues which have arisen and whether recent changes in the legislation have addressed those issues. As a result, it makes recommendations for alternatives to restraint, rather than changes to the restraint order regime.

4.2 The nature of the orders

For a confiscation order made pre-POCA 2002 the powers available are restraint and charging orders which can only be made in the High Court. Since POCA 2002 only restraint orders can be made, and applications are heard in the Crown Court. A restraint order is an order against a person preventing them from dealing with property.[794] As such a restraint order applies to realisable property, and can apply very widely as it can prevent anyone dealing with realisable property owned by the defendant or that he has an interest in[795] as it prevents a person dealing in property.[796] It does not just apply to the defendant but to anyone else who owns a share in property with the defendant. This means that if a defendant has a share in a home or a bank account a co-owner may not be able to deal

[793] HAC 2016 Report (n 26) 7.
[794] Sutherland Williams, Hopmeier and Jones (n 58) 15.
[795] POCA 2002, s 41(1).
[796] Home Office Guide (n 4) 13.

with the property. A restraint order also applies to a bank holding an account for the defendant.[797]

Under the pre-POCA 2002 legislation a charging order is defined as 'an order …imposing on any such realisable property as may be specified in the order a charge for securing the payment of money to the Crown.'[798] A charging order is narrower in scope as it only applies to the property itself subject to the charge[799] and only applies to the defendant's or third party's interest in it.[800]

However, the process is complex. Originally this was because there was a mix of the civil nature of the applications and the criminal nature of the confiscation proceedings, but also because the processes were unfamiliar.[801] The restraint proceedings in POCA 2002 are still complex[802] as confirmed by the High Court in the postscript to *Lexi Holdings*. The Court explained that sometimes issues in relation to restraint can be straightforward and heard normally in the Crown Court. However, sometimes restraint cases are complex involving beneficial interests, equitable charges and tracing and consideration should be given to listing applications to relax such restraint orders before a specialist Chancery Circuit judge or a High Court judge of the Chancery Division, or heard by a Crown Court judge with the relevant experience.[803]

4.3 The development of restraint and charging pre-POCA 2002

The DTOA 1986, which included the first restraint and charging order provisions 'owes much to the Hodgson report'.[804] The Hodgson Committee considered the limited case law on injunctions by police prior to trial and found that it was only possible to obtain an

[797] Sutherland Williams, Hopmeier and Jones (n 58) 25.
[798] DTOA 1986, s9(2); CJA 1988, s 78(2); DTA 1994, s 27(2).
[799] DTOA 1986, s9; CJA 1988, s 78; DTA 1994, s 27; Home Office Guide (n 4) 14.
[800] *Re Norris* (n 3).
[801] Levi and Osofsky (n 162) 18.
[802] The complexity of restraint orders under POCA 2002 was also identified as an issue in Bullock and others (n 29) iii.
[803] *Lexi Holdings* (n 542) [92].
[804] Alldridge, *Money Laundering Law* (n 39) 77.

injunction if the asset was arguably the property of the victim of crime.[805] It also considered the restraint of assets in civil proceedings before recommending that pre-trial restraint should be available to the State to enforce a confiscation order[806] totalling £10,000 or more, as long as the restraint was proportionate to the likely confiscation order.[807] The Committee found that there was no logic in allowing a civil claim to be brought by a victim for a bank account to be restrained, but not the State enforcing a fine or confiscation.[808]

As a result, restraint orders and charging orders were introduced in the DTOA 1986. These were discretionary orders that could be made in the High Court on the application of the prosecutor as a way of enforcing confiscation orders. Powers of the High Court to make restraint and charging orders continued in the CJA 1988 and the DTA 1994. Although powers of the High Court were widened as the legislation was amended, the powers of the High Court pursuant to the CJA 1988 (as amended) and the DTA 1994 were similar.[809] It was intended that these powers would be used in larger and more complex cases leaving other cases to be enforced in the magistrates' court in the same way as a fine.[810]

The restraint order prohibits any person from dealing with realisable property unless permitted by the restraint order.[811] 'Realisable property' is defined in the Acts to include any property held by the defendant, or by anyone else if the defendant had made a gift covered by the Act.[812] The order can be widely drafted and can apply to all realisable property held by a person whether or not it was described in the order and can apply to

[805] Hodgson Report (n 123) 106.
[806] Or fine or compensation order.
[807] Hodgson Report (n 123) 107-108.
[808] ibid 107.
[809] By the time of the amended CJA 1988 and the DTA 1994 there were powers to make a restraint order and charging order before charge and after a confiscation order had been made. The powers to make a restraint order and charging order are contained in DTOA 1986, s 7, CJA 1988, s 76 as amended, and DTA 1994, s 25.
[810] 'The UK Drug Trafficking Offences Act 1986' (n 17) 1632.
[811] DTOA 1986, s 8; CJA 1988, s 77; DTA 1994, s 26.
[812] DTOA 1986, s5; CJA 1988, s 74; DTA 1994, s 6.

property transferred after the making of the order.[813] A restraint order is enforceable by the appointment of a receiver.[814] The only difference between the pre-POCA 2002 legislation is that where a restraint order has been made under the DTA 1994 the High Court or county court could appoint a receiver, whereas one could only be appointed in the High Court where the restraint order was made under the DTOA 1986 or the CJA 1988.[815]

Like restraint orders, charging orders were introduced in the DTOA 1986 and the powers were available to the High Court in the same circumstances, namely that the proceedings had started and not concluded, and there was reasonable cause to believe that the defendant had benefited from drug trafficking.[816] The application was made in the same way as a restraint order.[817]

The wording of the charging order provisions changed slightly as it progressed from the DTOA 1986, through the CJA 1988 and the DTA 1994 but the majority of the provisions remain the same. Under the DTOA 1986, a charging order could be made absolutely or subject to conditions including notifying the person holding any interest in the property to which the order relates, or when the order was to become enforceable.[818] Under the CJA 1988 and the DTA 1994 the order could again be made absolutely or on conditions, but with the additional condition as to the time when the order came into effect.[819]

A charging order can be applied for only by the prosecutor, and like a restraint order can only be made to the High Court; with any application to discharge or vary an order also made to the High Court. The court must discharge the charging order if the proceedings are concluded or the payment is made in full.[820] The assets that could be subject to a

[813] DTOA 1986, s 8(2); CJA 1988, s 77(3); DTA 1994, s 26(2).
[814] DTOA 1986, s 13; CJA 1988, s 82; DTA 1994, s 31.
[815] DTOA 1986, s 11(1); CJA 1988, s80(1); DTA 1994, s 29(1). The Working Group First Report recommended that the county court should have jurisdiction to appoint receivers (n 137) 9.
[816] DTOA 1986, s 9.
[817] DTOA 1986, s 7, CJA 1988, s 76, and DTA 1994, s 25.
[818] DTOA 1986, s 10(1).
[819] CJA 1988, s 78(3)(d), DTA 1994, s 27(3)(d).
[820] DTOA 1986, s9(7), CJA 1988, s 78(7); DTA 1994, s 27(7).

charge in the pre-POCA 2002 legislation are land and certain securities;[821] and a charge is registered in the same way as an order made under the Charging Orders Act 1979.[822] The order can be made in an amount equal to the value from time to time of the property charged but not exceeding the amount of the confiscation order.[823] A charging order creates an interest in the property subject to the charge. It does not prevent anyone dealing with the property but does require notice to be given to the person in whose favour the charge is made.

A charging order can be enforced by the appointment of a receiver and an application for order for sale although the powers of the receiver in relation to charging are not as wide as those in relation to restraint, as the court cannot order anyone to give possession of the property to the receiver or to realise the property.[824] This means in practical terms that the receiver would have to apply for an order for sale and the receiver would have his fees paid first.

4.4 Procedure for applying for a charging order in the pre-POCA 2002 legislation

The application for a restraint and charging order under the pre-POCA 2002 legislation is made by the prosecutor in the High Court and the process is covered by the Rules of the Supreme Court (RSC) Order 115. The current process for applying for a restraint order is analysed when looking at POCA 2002 restraint,[825] and this section concentrates on the process for applying for a charging order under the pre-POCA 2002 legislation. Under RSC Order 115, the prosecutor has to support the application with a witness statement or affidavit.[826] If the charging order is made then the prosecutor must serve the order and a copy of the witness statement or affidavit on all relevant parties.[827] A charging order (and a restraint order) can only be made on the application of the prosecutor and can be made

[821] DTOA 1986, s9(5), CJA 1988, s 78(5); DTA 1994, s 27(5).
[822] DTOA 1986, 10, CJA 1988, s 79; DTA 1994, s 28.
[823] DTOA 1986, s 9(1), CJA 1988, s 78(1); DTA 1994, s 27(1).
[824] DTOA 1986, s 11(3); CJA 1988, s80(3); DTA 1994, s 29(3).
[825] Which are governed by the Criminal Procedure Rules.
[826] RSC Ord 115, r 3.
[827] RSC Ord 115, r 4(4).

without notice to a judge in chambers.[828] The limited case law on charging orders made in confiscation proceedings supported the idea that an order made without notice should not have a return date. Instead the order could be made with provision for the parties to apply to the court at short notice if there is a need for a hearing with notice.[829]

Either the prosecutor or anyone affected by the charging order can apply for the charging order to be discharged or varied and again the application must be supported by a witness statement or affidavit and served in accordance with the Order.[830] There is no need to give notice if the case is urgent or notice would cause a reasonable apprehension of the dissipation of assets.[831] The charging order must be discharged by the court if proceedings for the offences have concluded, or the payment of the amount secured by the charge has been paid in full; and may be discharged if the prosecutor gives notice that it is no longer appropriate for the charging order to remain in place.[832]

The terms of a charging order made under the pre-POCA 2002 legislation is left to the judge in chambers, including whether a condition to notify any other person with an interest in the property should be included.[833] Mitchell et al explain that if charging orders were made it would be prior to a confiscation order being made, and should be in the following terms:

> The [defendant's beneficial interest in the] property known as X shall be charged forthwith for securing payment to the Crown of an amount equal to the value from time to time of the said [beneficial interest in the] property (subject to any prior charges).[834]

[828] DTOA 1986, s 9(3); CJA 1988, s 78(3); DTA 1994, s 27(3). The equivalent provisions for restraint are DTOA 1986 s 8(4); CJA 1988 s 77(5); DTA 1994 s 26(4).
[829] *Ahmad v Ahmad* [1999] 1 FLR 317 (CA).
[830] RSC Ord 115, r 5.
[831] RSC Ord 115, r 6.
[832] RSC Ord 115, r 5(3)-(4).
[833] *Re Norris* (n 3).
[834] *Mitchell Taylor and Talbot* vol 1, para 3.059 (R0: February 2002).

The discretion whether to make a charging order under the DTA 1994 has been given as an example of the fact that genuine property rights of third parties are respected under the confiscation legislation; and also that the draconian nature of the confiscation legislation is not to be 'applied indiscriminately.[835]

4.5 The use of charging orders in the pre-POCA 2002 legislation

According to Levi and Osofsky, a charging order made under the pre-POCA 2002 legislation was 'especially well-suited' when a defendant owns part of an asset as it secures the Crown's interest in the property until the payment secured by the charge is made into the court.[836] They also found that it was felt by some police officers and prosecutors that there were difficulties with these applications as they were unfamiliar, being civil in nature even though they related to criminal proceedings.[837]

Guidance became available from the Home Office guide which included the use of charging orders,[838] but by the time of the Working Group Third Report it was found that justices' clerks had little guidance when enforcing large cases, especially those with restraint or charging orders. It was therefore recommended that guidance or legislation should make it clear that the relevant prosecuting agency is responsible for enforcing a confiscation order if there is a restraint order or charging order in force.[839] If the recommendation in this thesis to introduce a confiscation charging order is adopted then the lead agency would be determined at the stage when the charging order is made.[840]

The Working Group Third Report also made recommendations in relation to the use of civil enforcement powers of the magistrates' court (which were then undertaken by the justices' clerk). The Report identified the scope for increased use of charging orders and

[835] *Customs and Excise Commissioners v A* (n 494) [24].
[836] Levi and Osofsky (n 162) 20.
[837] ibid 18.
[838] Home Office Guide (n 4) 14-15.
[839] Working Group Third Report (n 126) para 2.31.
[840] It is recommended that if there is a risk of dissipation then the prosecutor should be the lead agency, but if the charging order will come into effect after time for payment has expired, that is, it is an enforcement action, then HMCTS will be the lead agency.

recommended that the confiscation legislation should be amended so that a justices' clerk could apply for a charging order and a receiver to enforce the order in the county or High Court. Running alongside this was a recommendation that what is now the designated officer for the magistrates' court[841] should be able to deduct their costs from the confiscation order monies in the same way that a receiver does.[842] However, it is submitted that the recommendation for the designated officer to apply for a charging order in the county court or High Court using the pre-POCA 2002 legislation would create the same practical issues as applying in those courts using Part 3 of the MCA 1980 in relation to costs and re-litigation.[843] It is therefore recommended that a power to make a confiscation charging order for confiscation orders made under POCA 2002 should be introduced.

There is an example of charging orders being used in confiscation order proceedings pursuant to the CJA 1988 where the defendant owned a number of properties including a share in the matrimonial home which provides judicial support for the use of charging orders. Hobhouse J considered that as the confiscation legislation is there to ensure that people do not profit from their crimes it is necessary for strong powers, by which he meant charging orders, to be available to achieve that.[844] He opined that as a result orders such as the charging order in this case have to be made in a 'comprehensively and appropriately strong form' and early in proceedings to ensure that defendants do not evade the consequences of the legislation.[845] This adds further strength to the recommendations in this thesis in relation to the introduction of a power for the Crown Court to make charging orders under POCA 2002.[846]

[841] When the report was written the enforcement responsibility lay with the justices' clerk, but the functions of the justices' clerk and the designated officer in this regard are the same, n 22.
[842] Working Group Third Report (n 126) paras 2.33-2.37.
[843] Namely the difficult process, the re-litigation of issues and the costs involved.
[844] *Ahmad v Ahmad* (n 829) [324] (Hobhouse LJ).
[845] ibid [324] (Hobhouse LJ).
[846] Namely that a charging order can preserve property and can be sufficient to preserve assets so they are available to satisfy the confiscation order.

Despite this, although the Proceeds of Crime Bill was initially drafted to include charging orders, the view of the government was that the use of charging orders should be abolished. This was because it said that they were used rarely in relation to confiscation, as property that could be made subject to a charging order could also be made subject to a restraint order or enforced in some other way. On this basis the government felt that there was a 'strong case to abolish the provisions on charging orders in the confiscation legislation' which was its proposal.[847] This view can be seen to be supported by Mitchell et al who comment that charging orders were 'rarely made at all'[848] and in practice only in the case of land.[849] As a result the Explanatory Notes to POCA 2002 describe the abolition of charging orders as a fundamental change to the restraint order provisions and explain that they were abolished as 'unnecessary'[850] although in practice the power is still available for confiscation orders made under the pre-POCA 2002 legislation.[851]

Because charging orders are not an option for the Crown Court in POCA 2002, the only power to apply for a charging order is by the designated officer for the magistrates' court using section 87 MCA 1980 after time for payment has expired.[852] It is recommended that the time has come to revisit the decision not to include charging orders as a power for the Crown Court in POCA 2002. The re-introduction of the power would provide an alternative to restraint and meet some of the issues identified in relation to the restraint order regime outlined in this chapter.

4.6 A restraint order under POCA 2002

Sutherland Williams et al state that the use of civil remedies in the criminal courts to prevent dissipation and realise assets are one of the most striking features of the confiscation regime.[853] Changes had been made to the restraint process but in the PIU

[847] *Proceeds of Crime Bill: Publication of Draft Clauses* (n 31) para 2.13.
[848] *Mitchell Taylor and Talbot* vol 1, para 3.059 (R0: February 2002).
[849] ibid vol 1, para 3.061 (R0: February 2002).
[850] Explanatory Notes to the Proceeds of Crime Act 2002, paras 86-87.
[851] Text to n 782-n783.
[852] Using the fines based powers.
[853] Sutherland Williams, Hopmeier and Jones (n 58) 137.

report it was suggested that further improvements could be made and figures produced in the report showed a declining number and percentage of restraint orders.[854] Earlier reviews had raised concerns about issues because applications had to be applied for at the High Court in London[855] and there was a recommendation in the HAC Seventh Report that applications for restraint orders should be able to be made at District Registries of the High Court to reduce delays.[856] The PIU report recommended that restraint orders and charging orders should be made at the Crown Court (rather than at the High Court) so that applications were not limited to the 20 judges in the High Court authorised to hear restraint cases, who sat mainly in London.[857] There was no other mention of charging orders in the report and no details of the numbers of orders made.

A restraint order made under the pre POCA 2002 legislation is a civil order. The order has to be made by the High Court, but the PIU criticised the fact that the confiscation order would be made in the Crown Court (or in the case of the CJA 1988 possibly the magistrates' court), but any applications for a charging order or a restraint order would be heard in the High Court. As a result, the PIU report recommended that both charging orders and restraint orders should be made available in the legislation that became POCA 2002 but that they should be made at the Crown Court as part of what was seen as the creation of a one stop shop for confiscation at the Crown Court.[858] The Proceeds of Crime Bill[859] adopted many of the recommendations in the PIU report. There was one issue not identified in the report, but which the government addressed in the legislation namely the power to make a restraint order earlier in the proceedings. Acknowledging that this had not been addressed in the report, the Bill was drafted to allow restraint and charging orders to be made at any time after an investigation had been commenced.[860] The Regulatory Impact Assessment to the Bill assessed that the increased use of restraint

[854] PIU Report (n 117) 68.
[855] HAC Seventh Report (n 129) xviii; Levi and Osofsky (n 162) 34-35.
[856] HAC Seventh Report ibid xviii.
[857] PIU Report (n 117) 69.
[858] *Proceeds of Crime Bill: Publication of Draft Clauses* (n 31).
[859] Proceeds of Crime HC Bill (2001-02) [31].
[860] *Proceeds of Crime Bill: Publication of Draft Clauses* (n 31) para 2.11.

orders would lead to more effective confiscation orders[861] whilst the transfer of the power to order restraint from the High Court to the Crown Court would simplify the law and result in increased efficiency.[862]

Mitchell et al explain that the restraint powers in the CJA 1988 and the DTA 1994 were 'found to be effective' and 'remained untrammelled.' It was therefore unsurprising that the restraint powers in POCA 2002 were similar.[863] The legislation in relation to receivers changed slightly in POCA 2002, but only because the High Court has inherent powers to make orders in relation to restraint. Because the Crown Court now appoints receivers, the duties of a receiver are now specified in POCA 2002.[864] The fact that restraint orders and the appointment of receivers are dealt with in the Crown Court is as a result of the aim to create a one stop shop for confiscation in the Crown Court.

The current powers to make a restraint order under POCA 2002 are contained in sections 40 to 42 of the Act. The applicant can be a prosecutor or an accredited financial investigator[865] and one of five conditions has to be satisfied before the Crown Court can make a restraint order.[866] Once the order is made, the Crown Court can make any order to ensure that the restraint order is effective. [867]

The first condition which can trigger a restraint order applies if a criminal investigation has been started in England and Wales and there are reasonable grounds to suspect that the alleged offender has benefited from his criminal conduct.[868] The second condition arises where proceedings have started but not been concluded and there is reasonable cause to believe that the defendant has benefited from his criminal conduct.[869] The third condition

[861] ibid Annex, para 26.
[862] ibid Annex, para 27.
[863] *Mitchell Taylor and Talbot* vol 2, para III.001 (R3: October 2003).
[864] POCA 2002, ss 49, 51.
[865] POCA 2002, s 42(2).
[866] POCA 2002, s 40.
[867] POCA 2002, s 41(7)-(7D).
[868] POCA 2002, s 40(2). This condition was changed from *reasonable grounds to suspect* to *reasonable cause to believe* by the Serious Crime Act 2015. Text to n 901-n 912.
[869] POCA 2002, s 40(3).

applies if there is an application by the prosecutor for a re-consideration of a confiscation order under sections 19 or 20 POCA 2002, or an application for a confiscation order is made because the defendant has absconded;[870] and there is reasonable cause to believe that the defendant has benefited from his criminal conduct.[871] The fourth and fifth conditions apply to applications by the prosecutor for a reconsideration of benefit[872] or available amount[873] or where the court believes that an application is to be made when there must be reasonable cause to believe that the court will decide that the new amount under the new calculation of the defendant's benefit or available amount (as the case may be) will exceed the relevant amount. There are safeguards for the defendant in the Act as the court cannot grant the application if there has been undue delay or the prosecutor does not intend to proceed.[874]

As can be seen a restraint order can be applied for under POCA 2002 as soon as a criminal investigation has been started in England and Wales as long as certain criteria have been met. The legislation also widened the persons who can apply for restraint. A financial investigator can now apply for a restraint order under POCA 2002; under the pre-POCA 2002 legislation only a prosecutor could apply.[875] Like the previous legislation, the restraint order applies to realisable property[876] and prevents the defendant and anyone else affected by the order dealing with the defendant's property unless permitted by the order.[877]

[870] Under sections 27 or 28 POCA 2002.
[871] POCA 2002, s 40(4).
[872] POCA 2002, s 40(5). The application for a reconsideration of benefit is contained in section 21 POCA 2002.
[873] POCA 2002, s 40(6). The application for a reconsideration of available amount is contained in section 22 POCA 2002.
[874] POCA 2002, s 40(8).
[875] DTOA 1986, s 8(4); CJA 1988, s 77(5); DTA 1994, s 26(4).
[876] Realisable property is defined as any free property held by the defendant or by the recipient of a tainted gift. POCA 2002, s 83.
[877] POCA 2002, s 41(1).

4.7 Restraint and the ECHR

As has been noted, a restraint order is a temporary order but it can last a long time and prevents anyone named in the order from dealing with realisable property owned by the defendant or that he has an interest in to ensure that a confiscation order is satisfied. Like confiscation, a restraint order is viewed as draconian,[878] and it is 'common ground' that restraint and receivership orders are also compatible with A1P1 to the ECHR. [879]

It has been held that the State's interference with a defendant's property rights is not disproportionate because there is a significant public interest in ensuring that criminals do not profit from their crimes and that the proceeds of crime are confiscated in the event of conviction, which extends to preventing the dissipation of assets prior to trial to ensure that any confiscation order made will not be thwarted.[880]

The fact that a restraint order is temporary and there are safeguards in the system including judicial oversight and compensation for economic loss where the restraint was illegitimate ensure that restraint is proportionate.[881] There are also further protections in the regime. The Crown Court does not have to make a restraint order even if the statutory criteria are satisfied; the court must be satisfied that there is a risk of the dissipation of assets.[882] There is no statutory definition of dissipation, but the principles have been confirmed in case law. In *R v B*[883] the Court of Appeal held that it is wrong to make a restraint order without the prosecution establishing a real risk of the dissipation of assets. Otherwise there is no ground for the interference with a defendant's A1P1 rights. This case involved a restraint order made before charge and there was no dissipation even though there had been the opportunity to do so over a period of 6 months.

[878] *Windsor v CPS* (n 490).
[879] *Hughes* (n 523) relying on *Raimondo v Italy* [1994] ECHR 3.
[880] *Hughes* ibid [52].
[881] Young (n 738) 472.
[882] Sutherland Williams, Hopmeier and Jones (n 58) 23-25.
[883] [2008] EWCA Crim 1374, [2009] 1 Cr App R 14.

Wood concluded that one of the reasons for a lack of restraint order applications by the prosecution was the dissipation test which is there must be a real rather than fanciful risk of dissipation.[884] However, it is difficult to argue with Mitchell et al who conclude that the discretionary nature of the order means that restraint orders are capable of being exercised in a proportionate way even though A1P1 applies and if there is no risk of dissipation a restraint order would be unnecessary and disproportionate.[885]

4.8 The legislative steer

The pre-POCA 2002 Acts all have sections which determine how the powers of courts are to be exercised in relation to restraint orders and charging orders and also apply to the powers of a receiver.[886] This is known as the 'legislative steer' because the provisions legislate for powers to be exercised 'with a view to' something being achieved.[887]

In *Re Peters* it was held that the 'legislative steer' in section 13(2) of the DTOA 1986 meant that the purpose of the restraint order was to preserve the value of the property to satisfy any confiscation order.[888] The same 'legislative steer' was then replicated in the CJA 1988 and the DTA 1994.[889]

The legislative steer in POCA 2002 still applies to both restraint orders and the powers of a receiver, but there were changes. Any powers must be exercised with a view to making the value of realisable property available to satisfy any confiscation order that has or may be made. This must be done without taking into account any obligation of the defendant or recipient of a tainted gift, if that conflicts with the satisfaction of any confiscation order. It applies in relation to any confiscation order that has or may be made, but if the

[884] Wood, The Big Payback (n 5) 5.
[885] *Mitchell Taylor and Talbot* vol 1, paras 3.025-3.026 (R5: September 2004).
[886] DTOA 1984, s 13; CJA 1988, s 82; DTA 1994, s 31.
[887] *Lexi Holdings* (n 542) [64].
[888] *Re Peters* (n 428).
[889] CJA 1988 s 82; DTA 1994, s 31.

confiscation order has not been made, the powers must be exercised with a view to ensuring that there is no diminution in the value of the realisable property.[890]

The change has been described as 'of most practical importance'.[891] Its effect is mandatory and therefore differs from the legislative steer in the legislation pre-POCA 2002.[892] If confiscation charging orders are introduced then this legislative steer will apply to them, as it already applies to any applications for charging orders made by the magistrates' court using the fines based enforcement powers. Under POCA 2002 there is also a restriction on all courts where there is a restraint order in place or an application for one has been made, namely any court may stay proceedings or allow them to continue as they see fit; and give the applicant for the restraint order and any receiver the opportunity to make representations.[893]

4.9 Application for a restraint order under POCA 2002

Applications for restraint and charging orders, and receivers pre-POCA 2002 are made in the High Court using RSC 115, supplemented by Practice Direction 115,[894] whereas applications in relation to restraint and receivers in relation to POCA 2002 are covered by the Criminal Procedure Rules (CrimPRs).[895] Sutherland Williams et al explain that the differences in the governing Rules are because the Crown Court does not have the same inherent power as the High Court[896] and therefore the Criminal Procedure Rules are more extensive. If confiscation charging orders are introduced, then the Criminal Procedure Rules will have to be amended to cover the orders. Under the Criminal Procedure Rules, the application has to be in writing and supported by a witness statement.[897] Like the

[890] POCA 2002, s 69.
[891] Sutherland Williams, Hopmeier and Jones (n 58) 16.
[892] *Lexi Holdings* (n 542) [63].
[893] POCA 2002, s 58(5)-(6).
[894] The Order does not cover applications made under the DTOA 1986 and Practice Direction 115 does not contain any directions about charging orders.
[895] The Criminal Procedure Rules (CrimPRs) Part 33. There is no accompanying Practice Direction.
[896] Mark Sutherland Williams, Michael Hopmeier and Rupert Jones, (eds), *Millington and Sutherland Williams on the Proceeds of Crime* (4th rev edn, Oxford University Press 2013) 134.
[897] CrimPR 33.51(3).

previous applications for restraint (and charging), applications for a restraint order made under POCA 2002 can also be made without notice but this should only be if the matter is urgent or there is a risk of dissipation of the assets.[898]

A restraint order or an order appointing a receiver can be varied or discharged on the application of the person who applied for the order or anyone who is affected by the order.[899] The process in the Rules replaces the practical procedure that applied in the pre-POCA 2002 legislation.[900]

4.10 Changes to restraint made in 2015

Changes were made to the restraint provisions of POCA 2002 by the SCA 2015 as a result of the 2013 Serious and Organised Crime Strategy which identified a need to improve the enforcement of confiscation orders[901] and a need for legislation in a number of areas[902] including stronger powers for the restraint of assets to strengthen POCA 2002.[903] Now the first condition that will justify the court making a restraint order is if a criminal investigation has been started in England and Wales and there are *reasonable grounds to suspect* that the alleged offender has benefited from his criminal conduct.[904] This was changed from *reasonable cause to believe* by the Serious Crime Act 2015.[905] The test was changed because it was felt that the reasonable cause to believe test was too high prior to charge when all the facts may not be known, and the change brought the test in line with the test for arresting a defendant without a warrant.[906] The Joint

[898] CrimPR 33.51(2).
[899] CrimPR 33.53-33.55.
[900] *Mitchell Taylor and Talbot* vol 2, para III.079 (R6: April 2005).
[901] 2013 Serious and Organised Crime Strategy (n 62) 34.
[902] namely defendants not attending court for the confiscation hearing; third party claims reducing the amounts available; and the fact that a prison sentence can only be used once which means that defendants can refuse to pay after imprisonment, 2013 Serious and Organised Crime Strategy, ibid 35.
[903] ibid 35.
[904] POCA 2002, s 40(2); emphasis added.
[905] POCA 2002, s 40(2)(b) was amended by SCA 2015, s 11; emphasis added.
[906] The power to arrest without a warrant is contained in the Police and Criminal Evidence Act (PACE) 1984, s24. The relevant provisions are that where anyone is in the act of committing an

Committee on Human Rights' scrutiny of the Serious Crime Bill considered the proposals to lower the threshold for making a restraint order under POCA 2002. It considered the purpose of a restraint order and agreed that the test should be lowered from reasonable cause to believe to reasonable grounds to suspect, in what was to become the amended section 40 of POCA 2002.[907]

The government was aware that the amendments to the restraint provisions reduced the safeguards against the right to peaceful enjoyment of possessions of the defendant and their dependants. However, the Committee was satisfied that the change was needed to address a 'real, practical risk' that assets would be dissipated or made unavailable to satisfy a confiscation order.[908]

In their review of the Serious Crime Act 2015, Sahota and Yeo commented that the amendments to the restraint order test were introduced as there were criticisms that 'the bar for obtaining a restraining order early in an investigation was too high' but the amendments to section 41 POCA 2002 mean that the defendant is protected as the court can discharge the restraint order if he is not charged within a reasonable time.[909]

These and other safeguards in the Act were explained by Edwards.[910] He commented that although the new powers to make a restraint order make it easier for the prosecutor to apply for an order, more safeguards were built into the legislation. The Crown Court was given an increased power to control the restraint proceedings by including a requirement to report on the proceedings and to discharge the restraint order if confiscation proceedings are not started within a reasonable time. In addition, the Crown Court was

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offence the test is that the constable has reasonable grounds for suspecting the person is about to commit an offence or to be committing an offence. If the constable has reasonable grounds for suspecting that an offence has been committed, he may arrest anyone whom he has reasonable grounds to suspect of being guilty of it, and if an offence has been committed, anyone whom he has reasonable grounds for suspecting to be guilty of it, PACE 1984, s 24(1)-(3).

[907] Joint Committee on Human Rights, Serious Crime Bill (n 737) para 1.15.

[908] ibid paras 1.15-1.16.

[909] Roger Sahota and Nicholas Yeo, 'In Practice: Criminal Justice: Serious Crime Act 2015' [2015] (21) LS Gaz 22.

[910] A Edwards, 'In Practice: Legal Update: Criminal Law: Serious Crime Act provisions' [2015] (25) LS Gaz 20.

given more powers of control over the investigation by including a requirement to report on the proceedings as ordered by the court.

It is the view of Hopmeier and Mills that these changes strengthen POCA 2002 by making it possible to apply for restraint earlier in the investigation, and at the same time as an arrest as the test is now the same. Their view is that the courts should encourage early restraint and the identification of assets to ensure that confiscation orders are made that are effective and enforceable.[911] This is supported by Levi's opinion that the elapsed time between the offence or obtaining profits to stopping access to funds by pre-conviction restraint or post-conviction orders is critical for recovery.[912] It is also the experience of the research author that the earlier that assets can be secured the better, otherwise there is nothing to stop a defendant dissipating an asset before time for payment has expired, and any changes that strengthen the powers of restraint are welcome. However, as shown in the following sections restraint is not always applied for and therefore alternatives to restraint are needed where the asset is a house or bank account.

4.11 The use of restraint orders

In most cases a restraint order, or where applicable a charging order, would be sufficient to preserve property and make it available to satisfy a confiscation order[913] and previous research shows there is a need for the use of restraint to secure assets so they are available to satisfy a confiscation order. It has been asserted that 'effective and early' restraint is essential to prevent cash and other assets being transferred, including overseas,[914] and judges, CPS and financial investigators see restraint as a useful tool, although orders have to be handled carefully because of their severe nature and the costs involved if used incorrectly.[915] The best use of restraint is seen as a key part of

[911] Hopmeier and Mills (n 675) 458.
[912] Levi 'Reflections on Proceeds of Crime' (n 38) 5.
[913] Sutherland Williams, Hopmeier and Jones only mention restraint (n 58) 69*; Mitchell Taylor and Talbot* mention both restraint and charging orders vol 1, para 3.063 (R0: February 2002).
[914] PIU Report (n 117) 68.
[915] Bullock and others (n 29) 22.

maximizing the enforcement of confiscation orders, especially for high value serious organised crime cases,[916] and it is easier to enforce confiscation orders if assets are restrained.[917] Bullock et al found that confiscation orders with a restraint order were more likely to be paid than those without and this supported the views of the practitioners they interviewed that restraint was critical to the enforcement of confiscation orders.[918]

The Thematic Review found that an increased use of restraint orders would result in an increase in the amounts collected.[919] The NAO and PAC Reports found that there was a link between early action and successful enforcement and there is a recommendation in the PAC Report in 2014 for criminal justice agencies to work more closely together to enable the early use of restraint.[920] Wood reported that the view of practitioners interviewed as part of her research was that restraint orders 'have a significant effect on the overall success of enforcement' of a confiscation order, noting that this was opinion and not based on empirical evidence and she lamented that this is a poorly understood area.[921] These findings are supported by Hopmeier and Mills in 2019 who encourage the use of early restraint to ensure that confiscation orders are both efficient and enforceable.[922]

Despite the undoubted need for restraint orders, there are difficulties which prevent their use in practice and reliance has been placed on the number of orders made to show that there is a need for improvement. Issues have been raised since the powers were introduced and practitioners and reviews have said that the number of restraint orders made is too low.[923]

[916] Bullock and others (n 29) iii.
[917] Bullock, 'Enforcing Financial Penalties' (n 44) 331.
[918] Bullock and others (n 29) 21.
[919] Joint Thematic Review (n 3) 8.
[920] The NAO Progress Report (n 367) 10, 30. PAC Report (n 328) 4.
[921] Wood, The Big Payback (n 5) 4.
[922] Hopmeier and Mills (n 675) 458.
[923] As outlined in chapter 2, for example Wood, The Big Payback (n 5) 5. The NAO Progress Report (n 264) 30.

The Asset Recovery Strategy set a target for prosecuting agencies to consider applying for restraint orders in more cases to prevent disposal of assets prior to confiscation[924] yet in 2013 the NAO found that the number of restraint orders was falling. It also reported the views of stakeholders that the CPS was too cautious and that opportunities were being missed.[925] The PAC used these findings to recommend that law enforcement agencies should work together to use restraint early and report to the Criminal Finance Board on priority cases, although this recommendation was focused on high value cases.[926] The NAO Progress Report showed a 12% decrease in the use of restraint orders since its previous report to 1,203 orders, and a 36% reduction in restraint since 2010-2011. However, it reported a reverse in the trend in 2015-2016 citing the legislative changes in the Serious Crime Act 2015 which made it easier to apply for restraint orders as a potential reason, although the NAO saw the continued low use of restraint as a problem for future enforcement.[927]

The NAO figures showing a reduction in the number of restraint orders were relied upon in the HAC 2016 Report.[928] The Committee accepted the evidence that defendants are becoming more sophisticated at concealing assets and that assets should be frozen as early as possible, simultaneously with the defendant becoming aware of the investigation if possible. It emphasised that waiting for a conviction to seize and restrain assets is too late, having heard that the recovery of assets was often only considered after conviction.[929] The government agreed that assets should be restrained early if it is appropriate to do so, although, it was its view that the use of statistics about the volume and value of orders is not necessarily helpful as a measure of performance or as a target.[930]

[924] Asset Recovery Strategy (n 223) target (v).
[925] In 2012-13 it found that 1,368 orders were made which was a 27 percent reduction from 2011-12 when 1,878 restraint orders were made. NAO Report (n 71) 29.
[926] PAC Report (n 328) 4.
[927] NAO Progress Report (n 367) 30.
[928] HAC 2016 Report (n 26) 3.
[929] ibid 10, 34.
[930] Government Response to the HAC 2016 Report (n 432) 3.

This research does not rely on the number of restraint orders made to support its recommendations but the figures indicate that the number of orders made is lower than expected and this has implications on the ability of the magistrates' court to enforce and there are clearly issues preventing their use. Bullock et al expected to find restraint used in high value cases, they found that the average amount of a confiscation order with a restraint order was around £15,600 compared with £56,500 where there was no restraint order, which was an unexpected conclusion.[931] As it was intended that restraint orders would be used in larger and more complex cases leaving other cases to be enforced in the magistrates' court in the same way as a fine[932] these figures are surprising and show that restraint is not being used in the types of cases envisaged. If a restraint order is not in place, the magistrates' court is limited to its fines based powers and the confiscation specific powers. Although the payment order provisions have been introduced where the asset is cash in a bank account, those powers only apply if the confiscation order is made under POCA 2002.[933] Where the asset is a house, the fines based powers are not effective[934] and it is the experience of the research author that without an effective power to secure the assets on imposition, enforcement is difficult.

4.12 Issues with restraint orders

POCA 2002 was an attempt to resolve the issues with restraint that had existed in the old legislation, but problems with the effectiveness of the order continued. In 2012 restraint orders were considered not to be effective as there were difficulties in preventing those subject to a restraint order from selling assets and opening new bank accounts.[935]

[931] Bullock and others (n 29) 21.
[932] 'The UK Drug Trafficking Offences Act 1986' (n 17) 1632.
[933] As confiscation orders under the pre-POCA 2002 legislation are being made and enforced there is a need for an alternative to making an application for a third-party debt order. This is the only option available and is not used often in practice.
[934] The only option is to apply for a charging order in the county court, again this is not used often in practice.
[935] Brown and others (n 173) iv.

The SCA 2015 amended the ground for applying for a restraint order prior to charge with the aim of strengthening the restraint provisions. Because of the change the court now has to be satisfied that a criminal investigation has been started in England and Wales and there are *reasonable grounds to suspect* that the alleged offender has benefited from his criminal conduct.[936] The practitioners interviewed by Wood questioned the value of this amendment as very few applications are turned down on the evidential threshold; instead she reported that applications were either not applied for or failed because of the perceived reluctance of the CPS due to the cost implications, or because of the view of the CPS that the case law on the dissipation test made applications difficult.[937] As a result Wood reported that interviewees did not feel that the changes to restraint in the SCA 2015 solved the issues and recommended that the Criminal Finances Board should empirically examine the link between restraint and successful enforcement, and whether the perceived reluctance of the CPS to apply is correct.[938] Wood's conclusions are contrary to the views of Hopmeier and Mills who see the changes to the evidential test made by the SCA 2015 as strengthening the regime. They see two advantages to the change, firstly that the lower evidential test makes it easier to obtain a restraint order earlier in the investigation which increases the potential for preserving assets effectively, and secondly that as the new test is the same as the test for an arrest, a restraint order can be obtained and served on a defendant at the same time as the arrest.[939]

As Wood avers there is a need for empirical evidence to see if there is a correlation between the use of restraint orders and the change in the evidential test,[940] but nobody could take issue with the view of Hopmeier and Mills that early use of restraint and a focus on identifying assets should be encouraged to ensure that confiscation orders are enforceable.[941] However, it is suggested that in order to secure assets it is not a restraint

[936] POCA 2002, s 40(2); emphasis added.
[937] Wood, The Big Payback (n 5) 4-5. The dissipation test is that there must be a real rather than fanciful risk of dissipation.
[938] ibid 5-6.
[939] Hopmeier and Mills (n 675) 458.
[940] Wood, The Big Payback (n 5) 4-6.
[941] Hopmeier and Mills (n 675) 458.

order per se that is always needed, but an order that secures the asset and makes it available to satisfy the confiscation order. The recommendations in this thesis show that there can be other orders which could complement the restraint order regime and would preserve assets without the problems associated with restraint.

4.12.1 Issues about costs

The changes introduced by the SCA 2015 did not address the issues about the costs of restraint. Levi and Osofsky published their research in 1995 and at that stage the CPS Central Confiscation Unit would operate a minimum threshold taking into account whether restraint would be worthwhile and cost-effective considering the administrative costs and defendant's allowable expenses.[942] The authors found that some police officers felt that restraint and confiscation orders should be sought even if the amount of any order would be less than the perceived policy minimum set by the CPS Central Confiscation Unit, as it was felt that any disruption to the working capital of drug dealers was of benefit, leaving aside any questions of cost effectiveness.[943]

Bullock et al found that restraint was not seen as an effective tool for low value orders taking into account the cost and effort. There was no agreed lower figure but a value of £15,000 was 'commonly mentioned' by those interviewed.[944] However, the Thematic Review found that value for money was not a factor in applying for a restraint order.[945]

The prosecutor can be liable for costs, for example, if the prosecutor fails to consider the risk of dissipation or put relevant documentary evidence before the court. The court can still make a restraint order but may order the prosecutor to pay the defendant's costs.[946] Interviews with CPS as part of Home Office research have shown that the potential risk of damages means that the CPS understandably wants to be sure that confiscation

[942] Levi and Osofsky (n 162) 11.
[943] ibid 10.
[944] Bullock and others (n 29) 21.
[945] Joint Thematic Review (n 3) 52.
[946] *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182.

proceedings will proceed before applying for a restraint order,[947] and the Thematic Review identified possible costs orders against the prosecution as a reason for caution in applying for restraint.[948]

One of the reasons given by officials in interviews with Wood for a perceived reluctance by CPS to apply for a restraint order was cost if the application fails which can include the costs incurred by a receiver.[949] Her findings are supported by Fisher who considers that the amendments in the SCA 2015 do not address the issue of legal costs which impede enforcement authorities from applying for restraint orders. This is because they can become liable for prohibitive legal costs if a restraint order is made but subsequently discharged and it results in extensive litigation.[950]

4.12.2 Other issues with restraint relevant to this thesis

In 2000 the PIU report identified the fact that restrained assets could not be confiscated immediately and recommended that this could be a power of the judge when making an order to make collection more direct and efficient, especially in relation to cash, bank accounts and items such as cars. The report recommended that the confiscation order should remain debt based rather than asset based and acknowledged that third parties should be given the right to make representations, but that all complicated property matters should be in the High Court.[951]

The Asset Recovery Action Plan identified gaps in the restraint process and started with the premise that the appointment of a receiver is a cumbersome and expensive process if it is not necessary, for example to manage a business. It suggested the automatic

[947] Bullock and others (n 29) 22.
[948] Joint Thematic Review (n 3) 33.
[949] Wood, The Big Payback (n 5) 5.
[950] Fisher (n 60) 762.
[951] The PIU Report (n 117) 71.

transfer of the title of property subject to restraint, and the power to seize property to satisfy a confiscation order if the defendant is convicted of acquisitive crime.[952]

These issues were addressed in part when changes to POCA 2002 were made by SCA 2015 and other changes to the Act were also brought into force. The first change provided a general power, that had previously been lacking, to retain property.[953] As a result of this change, if there is a restraint order in force the section can be used to ensure that items seized under another power, for example section 1 of PACE 1984, can be retained even after the original power has ceased, and held to satisfy a confiscation order.

Other sections were inserted into POCA 2002 to allow for the search, seizure, detention and sale of property that could be disposed of or diminished in value and which could be used to satisfy a confiscation order that has been made or may be made in the future.[954] These changes were as a result of the recommendations in the Asset Recovery Action Plan.[955] The idea behind the powers was the faster enforcement of orders where there are associated restrained assets, but the power was introduced for items not subject to restraint. The NAO saw these powers to seize property as a way of stopping defendants disposing of property, but noted that even if items are seized they could depreciate in value.[956] However, these are powers of the magistrates' court rather than the Crown Court and so are not part of the one stop shop approach envisaged in the Crown Court [957] although they allow the magistrates' court to deal with all matters to do with enforcement. As the powers do not relate to bank accounts or houses they are unable to meet the issues raised in this research in relation to these assets.[958]

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[952] Asset Recovery Action Plan (n 243) 24-25.
[953] Section 41A POCA 2002 was inserted by the Policing and Crime Act 2009, s 52.
[954] POCA 2002, ss 47A-47S, 67A-67D inserted by Policing and Crime Act 2009, ss 55, 58 and amended by the Crime and Courts Act 2013, the SCA 2015 and CFA 2017.
[955] Asset Recovery Action Plan (n 243) 25.
[956] The NAO Progress Report (n 264) 27.
[957] *Proceeds of Crime Bill: Publication of Draft Clauses* (n 31).
[958] For example, the powers in sections 47A-47S POCA 2002 do not permit the seizure of cash or exempt goods and permit entry into premises but not their seizure; and sections 67A – 67D POCA 2002 apply to personal property.

4.12.3 A house as an asset

Specific concerns have been raised about restraint and houses. Bullock et al found that there were different views among financial investigators about whether a house should be restrained with some financial investigators finding the power useful if the defendant has equity in the property.[959] The research carried a quote from a financial investigator that:

> [A restraining order was] applied because the defendant's main asset was a house which he was in the process of selling. This was restrained to prevent the dissipation of assets. Once his equity was in cash form it would easily have been dissipated.[960]

Other financial investigators thought monitoring, for example through the land registry, was sufficient,[961] a point echoed by Bullock when the difference in views was reported as disagreement between financial investigators over whether houses were suitable for restraint.[962] Some financial investigators felt that houses are not a priority because they are difficult to sell and movement can be monitored via the land registry.[963] Others have reported houses being sold 'from under their noses' sometimes to friends and family; or remortgaged without the financial investigators being able to seize the proceeds.[964]

Financial investigators may be able to monitor the ownership of houses through the Land Registry, but this is not a role of HMCTS and even if monitoring can be done, it does not provide for the satisfaction of the order. As a result, monitoring in itself is not sufficient to ensure that a confiscation order is paid. Despite the issues raised, the findings in the report were that houses and cash in bank accounts were the most likely assets suitable for restraint.[965]

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[959] Bullock (n 430) 332; Bullock and others (n 29) 21.
[960] Bullock and others (n 29) 21.
[961] ibid 21.
[962] Bullock, 'Enforcing Financial Penalties' (n 44) 332.
[963] Bullock and others (n 29) 21.
[964] Bullock, 'Enforcing Financial Penalties' (n 44) 332.
[965] Bullock and others (n 29) 21.

Over the years there have been issues with the valuation of property especially if there has been a downturn in property prices. The Working Group Third Report found that there was a wide disparity between the amounts ordered to be confiscated by the court and the amounts paid.[966] Their conclusions were that this was due in part to problems caused by what it referred to as 'the subsequent inadequacy of realisable property', citing a particular problem in the early 1990s caused by the property boom in the late 1980s and the subsequent slump in prices.[967]

Whether or not a restraint order or charging order is available, if a house is an asset identified as part of the confiscation order process, a valuation will be obtained so that the Crown Court can establish the benefit figure, and the recoverable or available amount. Levi and Osofsky found that in practice the police would obtain a valuation of an asset rather than the defendant[968] and that this would include where a house was involved. Like the Third Report, they also identified that a downward trend in property prices was a problem causing attrition.[969]

The Joint Thematic Review found that the financial investigator's initial assessment of the value of assets was 'routinely higher' than that of the defence valuation, and that the court often used the lower figure.[970] It also reported that there was little if any evidence produced by the defence in advance of the court hearing to prove the reduced figures suggested.[971] In particular interviewees expressed views that initial valuations by financial investigators were unrealistic or lacked a recognition of the current economic climate, particularly in relation to houses, and it found that financial investigators were often reluctant to vary their initial valuation of a house downwards if assertions were put

[966] Working Group Third Report (n 126) para 2.2.
[967] ibid para 2.7.
[968] Levi and Osofsky (n 162) 26.
[969] ibid viii, 51.
[970] Joint Thematic Review (n 3) 31.
[971] ibid 32.

forward by the defence prior to the confiscation hearing without any evidence being put forward.[972]

This echoes the earlier findings by Levi and Osofsky about the pre-POCA 2002 legislation that there was a reluctance by financial investigators to value houses at a figure lower than the benefit from crime at imposition, causing attrition later.[973] Bullock noted that the situation in relation to the valuation of houses is complex. Her fieldwork did not find any examples of the failure to enforce orders because of falling house prices but noted that at the time of the fieldwork house prices were generally increasing. By the time of her article house prices were falling and she was concerned that the attrition highlighted by Levi and Osofsky would re-appear.[974]

These are issues which would need to be considered if confiscation charging orders were made at the Crown Court, although they are not particular to charging orders. Wherever the asset is a house, valuations should be accurate in any event whether or not there is a restraint order or confiscation charging order as well. If there is a downturn in the property market, then the defendant can apply for a downward variation of the confiscation order.[975]

It is worthy of note that property prices can increase as well as reduce. If the defendant's benefit figure is higher than the available amount, then the prosecutor can apply for an upward variation of an order. In *R v Gunn*[976] the prosecutor had obtained charging orders in respect of two properties prior to a confiscation order being made. The court noted that if the value of the properties increased, the prosecution could apply for an upward variation of the confiscation order pursuant to section 22 of POCA 2002.

[972] ibid 31.
[973] Levi and Osofsky (n 162) viii.
[974] Bullock, 'Enforcing Financial Penalties' (n 44) 334.
[975] POCA 2002, s 22.
[976] [2014] EWCA Crim 1758.

4.13 The purpose and role of a receiver

The Hodgson Committee recommended the appointment of an individual, possibly called a receiver to administer the new powers. It saw the functions of this receiver as investigating the assets of persons suspected of major crime, applying for orders freezing accounts, preserving assets that have been frozen including managing businesses, releasing assets for living or legal expenses under the supervision of the court, and realising and distributing assets when the case is disposed of.[977] As with restraint the powers were introduced in the DTOA 1986 and still exist in POCA 2002.[978]

There are two types of receivers which can be appointed by the court. The role of a management receiver is to manage property which is subject to a restraint order by preserving the value of property until the conclusion of the proceedings.[979] The other type of receiver is an enforcement receiver whose role is to dispose of the property subject to a restraint order to satisfy the confiscation order.[980]

A receiver is an officer of the court as they have been appointed by the court and therefore any management is done on behalf of the court,[981] and the legislative steer applies to the appointment of a receiver under POCA 2002.[982] A receiver is usually a private sector appointment and charges costs and fees for the work done.

A receiver can be appointed to enforce a charging order under the pre-POCA 2002 legislation.[983] The provisions in the DTOA 1986 were introduced to ensure that the powers of a receiver continued even if the property changed hands as otherwise the court order would have been void against the purchaser in the event of a failure to register the

[977] Hodgson Report (n 123) 110.
[978] DTOA 1986, s 11; CJA 1988, s 80; DTA 1994, s 29; POCA 2002, ss 48, 50.
[979] POCA 2002, ss 48-49.
[980] POCA 2002, ss 50-51. The difference is explained in the Explanatory Notes to the Policing and Crime Act 2009, para 279.
[981] See for example *Glatt v Sinclair* [2013] EWCA Civ 241, [2013] 1 WLR 3602.
[982] POCA 2002, s 69.
[983] DTOA 1986, s 11; CJA 1988, s 80; DTA 1994, s 29.

change of ownership.[984] In the DTOA 1986 and the CJA 1988, the receiver can be appointed by the High Court, whereas in the DTA 1994 a receiver can also be appointed by the county court, but in all cases could only be appointed on the application of the prosecutor.[985] However, the powers of a receiver in relation to charging order enforcement relate only to enforcing the charge; the other powers of a receiver in relation to restraint, for example, taking possession of property, do not apply.

A more detailed review of the law relating to the appointment and roles of receivers falls outside the scope of this thesis. It is the costs involved in the appointment of receivers and the perceived reluctance of the CPS to apply for receivers which are particularly relevant to this research. What appears to have caused particular concern for the CPS is the potential for meeting the costs and expenses of a receiver if a restraint and receivership order should never have been made. The Court of Appeal considered this point in *Barnes v Eastenders Group*[986] and, taking into account the A1P1 rights of the Eastenders Group, held that it should not bear the costs and expenses. Again, considering the A1P1 rights of the receiver it also held that they should not bear the costs and expenses and so held that the CPS had to bear them. The sums were substantial, £772,547, and there has been a perceived nervousness from CPS to apply for the appointment of a receiver since this case[987] although the case has been seen as a deterrence to all agencies.[988] Gentle et al explain that the number of receivers appointed have reduced dramatically since this case because the costs have deterred the CPS from applying.[989]

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[984] HL Deb 13 May 1986, vol 474, col 1101.
[985] DTOA 1986, s 11; CJA 1988, s 80; DTA 1994, s 29.
[986] [2014] UKSC 26, sub nom *Eastenders Cash & Carry plc v Crown Prosecution Service* [2015] AC 1.
[987] Wood, The Big Payback (n 5) 5.
[988] Grant Thornton UK LLP and its Proceeds of Crime Team, Written evidence to Home Affairs Committee, *Proceeds of Crime* (HC 2016-2017, 25) http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Home%20Affairs/Proceeds%20of%20crime/written/29555.html> accessed 16 August 2016.
[989] They report that figures obtained by Grant Thornton LLP by way of a freedom of information request from HMCTS show that 18 receivership appointments were made in 2011 but only two were made in 2014 following the case which they say show that the costs and risks has deterred

Costs associated with the restraint order process have been shown to be an issue as outlined above, and also because when a receiver is appointed to manage or enforce a restraint order they can claim their expenses from the assets even after the restraint order has been discharged as they can claim post-discharge remuneration.[990] In the pre-POCA 2002 legislation the receiver's remuneration and expenses in enforcing restraint and charging orders comes before the payment into the consolidated fund[991] and the same provisions apply in POCA 2002.[992] The legislation also sets out an order for paying out expenses when an enforcement receiver has been appointed. Firstly, the receiver must pay certain other payments before paying any monies to satisfy the order.[993] But even then, although the amount paid reduces the amount of the order, other fees are taken out before the money is allocated by the designated officer. Certain insolvency fees are paid first (if they have not already been paid), then the fees of an enforcement receiver, before the fees of the storage and realisation of seized personal property. Only then are any priority orders paid.[994]

The appointment of a receiver, which may involve the sale of assets at a lesser price than the defendant can obtain, and the fact that the defendant may be required to pay the receiver's and prosecution costs of the appointment, have been described as one of the draconian aspects of the regime, there to encourage voluntary payment of the confiscation order.[995] However, despite the draconian nature, there is a role for a receiver which has been acknowledged. The Home Office explained the important part that receivers play in the enforcement of confiscation orders. Once appointed they can force

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the CPS and other agencies from applying for the appointment of a receiver, Gentle, Spinks and Harris (n 491) 11.

[990] *Glatt v Sinclair* (n 981).

[991] DTOA 1986, s 12; CJA 1988, s 81; DTA 1994, s 30.

[992] POCA 2002, ss 54-55.

[993] The enforcement receiver must first pay an insolvency practitioner's expenses, then any payments directed by the Crown Court before paying the money to satisfy the confiscation order. POCA 2002, s 54(2).

[994] POCA 2002, s 55. A priority order is any compensation, victim surcharge, unlawful profit order or slavery or trafficking reparation order which has been ordered to be paid out of the confiscation order, POCA 2002, s 13(3A).

[995] *Mitchell Taylor and Talbot* vol 1, para 8.002 (R0: February 2002).

the realisation of assets and can liquidate real estate owned jointly by the defendant and some other person, particularly a spouse,[996] but their appointment has been described as 'a balancing act' between the policy aims of removing assets from defendants and the implications on receipts.[997] This balancing act has been acknowledged in the Court of Appeal, when it was held that:

> It is important that this legislation continues to be operated to strip criminals of their ill−gotten gains. But it is important too that the court keeps a close control over those it appoints to act as receivers on its behalf and that costs are not too readily incurred, particularly before any confiscation order is made.[998]

Even if the costs of the receiver will be substantial and could diminish or extinguish amounts to satisfy the confiscation order, a receivership order can still be made if those factors are outweighed by the need to protect and preserve the property and its proceeds.[999] The CPS choose receivers from a list and value for money is used by the CPS when compiling their list of receivers.[1000] However, the costs of a receiver have been an issue since the Working Group Third Report which found that receivers' costs were high. This meant that although the figures indicated a collection rate of 37%, taking into account receivers costs this figure could be as much as between 45% and 50%.[1001] The PIU report also highlighted receivers' costs as an issue.[1002]

The NAO found making a cost-effectiveness assessment of the use of receivers by CPS and SFO difficult because of the lack of an explicit strategy for the use of management and enforcement receivers, and a lack of national performance and cost data.[1003] The figures showed that in 2012-2013 receivers were used in 112 cases costing £3.2 million

[996] Home Office Guide (n 4) 25.
[997] Wood, Enforcing Criminal Confiscation Orders (n 2) 10.
[998] *Hughes* (n 523) [60] (Simon Brown LJ).
[999] *Re Smith* [2017] EWHC 3332 (Comm).
[1000] Joint Thematic Review (n 3) 32.
[1001] Working Group Third Report (n 126) para 2.5.
[1002] PIU Report (n 117) 70.
[1003] NAO Report (n 71) 37.

and collecting £15.1 million. The report also showed that there were 299 receiver cases since 1997-98 with £18 million in fees and the concern of the NAO was that there was no national data to show whether this was cost-effective with a lack of monitoring of private sector receivers.[1004] By the Progress Report the NAO found an improvement in the use of private sector receivers as the CPS had improved its framework for their appointment and management.[1005]

Anecdotally the Joint Thematic Review found that receivers were not appointed unless absolutely necessary because the fees could substantially reduce the available assets[1006] and that the costs of restraint could be, but rarely were, substantial.[1007] However, the high costs of enforcement receivers were identified as a barrier and challenge to the enforcement of confiscation orders in 2012 because the fees could equal or exceed the recoverable assets.[1008] In 2016 there was a finding by Wood that because enforcement receivers are often from large accountancy firms, they are expensive,[1009] and interviews conducted by her suggested that the authorities are hesitant to use receivers because of the costs involved. This is even where the default sentence has been served and there is no other means of enforcing the order.[1010]

As there are concerns with restraint and receivers, it is important for there to be an alternative. The alternative should meet the concerns about the costs of receivers and address the difficulties for magistrates' courts trying to enforce where the asset is a house. The recommendation is for the introduction of a confiscation charging order with one option for the order to be made in favour of the designated officer for the magistrates' court, which means that any enforcement would be by them rather than a receiver.

[1004] ibid 39.
[1005] NAO Progress Report (n 367) 26.
[1006] Joint Thematic Review (n 3) 32.
[1007] ibid 33.
[1008] Brown and others (n 173) 13.
[1009] Wood, Enforcing Criminal Confiscation Orders (n 2) 9-10.
[1010] Wood, The Big Payback (n 5) 20.

4.14 Conclusions of chapter

Despite the issues, overall restraint orders are seen as an effective form of enforcement, and if not used, problems with enforcement result. Cost has been identified as an issue why more orders are not made, especially in relation to low value orders, and criticisms have been raised that orders are not made early enough in the proceedings, or at all. There is also a perceived reluctance by the prosecutor to apply for restraint or the appointment of a receiver because of the potential liability for costs. Wood concluded that one of the reasons for a lack of restraint order applications by the prosecution was the dissipation test which is there must be a real rather than fanciful risk of dissipation.[1011]

A restraint order is seen as particularly suitable where the asset involved is a house or cash, and although the restraint order provisions of POCA 2002 meet the one stop shop purpose of POCA 2002, the powers can only be effective if the order is made. The issues preventing restraint orders being applied for have not been addressed fully by the changes to POCA 2002 in 2015, and so it is recommended that alternatives are required where the asset is a house or cash in a bank account.

A restraint order can apply to all realisable property owned by the defendant and will apply to property jointly owned by the defendant or held by another, for example a bank account. A charging order applies less widely as it applies to specific property. In addition, although it can apply to property that is jointly owned, it does not prevent dealing with the property. As such it is more proportionate and less draconian than restraint.

The power to make a charging order in the pre-POCA 2002 legislation was not widely used and in practice only in relation to land (which includes a house). The charging order provisions were not included in POCA 2002, even though they had been included in the Bill. There are issues with the valuation of houses that have been identified by reviews.

[1011] Wood, The Big Payback (n 5) 5.

However, these are not particular to charging orders and would not prevent the introduction of a confiscation charging order as a power of the Crown Court.

This chapter demonstrates that, like other aspects of the confiscation regime, the restraint order process is draconian and complex. However, proportionality applies and there are balances to protect the rights of the defendant. If a restraint order and the appointment of a receiver does not infringe the Convention, neither should a charging order which is less draconian than a restraint order. Changes have been made to POCA 2002 to allow the seizure and realisation of assets, but these do not assist with the issues with houses and bank accounts[1012] and this enforces the need for further legislative change.

[1012] Text to n 953.

Chapter 5 Development of the law directly relevant to the enforcement of confiscation orders in the magistrates' court – the confiscation legislation

5.1 Introduction

This chapter starts to answer the question, how has the confiscation legislation developed in relation to the enforcement of confiscation orders in the magistrates' court? It also starts to consider what future legislative amendments might assist the enforcement of confiscation orders by the magistrates' court and create an alternative to restraint.

The complicated nature of the confiscation regime has already been highlighted in this thesis and the enforcement of confiscation orders in the magistrates' court is no different. The confiscation legislation has been amended on many occasions, and therefore HMCTS and the magistrates' court must identify not only the relevant legislation the confiscation order was made under, but whether the legislation had been amended. The use of fines-based enforcement powers for the enforcement of confiscation orders has added a further layer of complexity which is examined in the next chapter.

As the law has developed, powers were introduced in POCA 2002 to improve the magistrates' court powers of collection and enforcement of confiscation orders. Changes to the powers in POCA 2002 have been made by the SCA 2015 and the CFA 2017 and are analysed in this chapter. In addition, there are two sanctions which are seen as the main ones to support the enforcement of confiscation orders, namely the accrual of interest, and the setting and activation of default terms, which have implications for the magistrates' court. Unlike any other financial penalty, the serving of the default term for non-payment of a confiscation order does not wipe out the debt.[1013] Therefore even if the default term is served, the magistrates' court is responsible for enforcing the order after the defendant has been released, and interest will have accrued until the order is paid in

[1013] POCA 2002, s 38(5) provides that the serving of the default term does not stop enforcement of the confiscation order by other means. Similar provisions exist in the previous legislation although when the regime was first introduced serving the default term did mean that the confiscation order did not have to be paid. This is considered later in this chapter.

full. Doubt has been cast on the effectiveness of these sanctions,[1014] but rather than considering their effectiveness as a means of encouraging payment, which others have done, the impact on the magistrates' court along with the introduction of other powers in relation to confiscation are analysed in this thesis.

As the magistrates' court operates at the end of the process, if assets have not been identified or restrained at the Crown Court, then confiscation orders are difficult to enforce.[1015] It is therefore important that any assets which are available are realised to satisfy the confiscation order. Despite the provisions in relation to interest and the default term being seen as the main sanctions, they only come into effect once time for payment set by the Crown Court has expired. Whilst the accrual of interest is automatic once time for payment has expired, the activation of the default term is not, which is explored in the next chapter.

With the exception of a payment order, which can only be made for confiscation orders made under POCA 2002, the magistrates' court cannot make any orders to collect or enforce a confiscation order until time for payment has expired. However, HMCTS can and does contact the defendant and encourage voluntary payment.[1016] The time for payment set by the Crown Court is therefore a vital component of the confiscation order for the magistrates' court as it dictates what can be done and when. It is therefore the first thing considered in this chapter.

5.2 Time for payment

The period that the Crown Court has fixed for payment is important as the magistrates' court cannot enforce the confiscation order until time for payment has expired, and relies on the defendant voluntarily surrendering assets or paying the order, although since June

[1014] For questions about the effectiveness of the interest provisions, see n 1053; and n 1173 for issues raised about the effectiveness of the default term.
[1015] Evidence of Peter Handcock PAC Report (n 328) Ev 14. This is also the experience of the research author.
[1016] This is within the knowledge of the research author and is supported by the findings of the Joint Thematic Review (n 3) 44-45.

2015 it can make a payment order. HMCTS must calculate interest from when time for payment expires which is now done on JARD.[1017] The Crown Court can extend time for payment but only for confiscation orders made under POCA 2002. The time for paying a confiscation order runs from the date of imposition and cannot be extended by an appeal.[1018] The development of the time for payment provisions are not just of historical interest. Orders are still being made under the pre-POCA 2002 legislation as the confiscation legislation which applies is tied to the date of the offence not of sentence, and magistrates' courts are still enforcing such orders.[1019]

There was no statutory limit for time for payment for confiscation orders made under the pre-POCA 2002 legislation[1020] nor any power for the Crown Court to extend time for payment other than the 56 day slip rule in section 155 of the PCC(S)A 2000.[1021] The fact that confiscation orders were made with lengthy time for payment was identified as an issue which led to the changes to time for payment in POCA 2002.[1022]

In 1998 the Working Group Third Report, reported problems caused by time for payment granted at the Crown Court. There was no maximum time limit and it reported defendants being granted up to three years by a Crown Court to pay a confiscation order even though assets might be readily available. This was found to create unnecessary delays in the enforcement process and was contrary to the purpose of the confiscation legislation to deprive offenders of the proceeds of their crime. It recommended that a confiscation order

[1017] Since JARD was introduced in 2006 it has allowed interest to be calculated and tracked more easily.
[1018] *R v May and Others* [2005] EWCA Crim 367.
[1019] Text to n 78 in chapter 1. This is also within the experience of the research author.
[1020] The provisions are contained in DTOA 1986, s 6, CJA 1988, s 75 and DTA 1994, s 9 and were based on the fines provisions so time for payment was unlimited. Reference is made in the original versions of the legislation to the PCCA 1973 which were the provisions in relation to the imposition and enforcement of Crown Court fines. These provisions were replaced by the PCC(S)A 2000.
[1021] *Revenue and Customs Prosecution Service v Kearney* [2007] EWHC 640 (Admin). Nor can the magistrates' court extend time for payment, the magistrates' court's role being an ancillary role to that of the Crown Court, namely collection and enforcement, *CPS v Greenacre* [2007] EWHC 1193 (Admin), [2008] 1 WLR 438.
[1022] Explanatory Notes to the Proceeds of Crime Act 2002, para 30 explains that time for payment was unlimited.

should be paid forthwith with the power to grant a maximum of six months to pay which would be reasonable in cases where property such as houses or other high-value items had to be sold, although monies in bank accounts or held by the police should be paid immediately. It recommended that the defendant should be able to apply for up to six months to pay with the prosecutor having the ability to make representations.[1023]

This was echoed by the Home Office guide which stated that the Crown Court may allow time for payment and payment by instalments, suggesting that time for payment should be granted if the defendant needed to sell assets to satisfy the order, but giving a clear date for payment to be made,[1024] and judges were encouraged to specify a time for the payment of a confiscation order made under the pre-POCA 2002 legislation to avoid any confusion about when the order was to be paid.[1025]

Attempts were made to alleviate the problem by POCA 2002 and the introduction of a maximum period of time for payment which could be granted by the Crown Court. When POCA 2002 was introduced, the defendant should have been ordered to pay the order 'on the making of the order'[1026] although the court could allow up to six months to pay if the defendant showed that he needed time for the order to be paid.[1027] Within that time, the defendant could apply to the Crown Court for the period to be extended for up to 12 months, but the court could only grant the application if it believed there were 'exceptional circumstances'.[1028] There was no definition of exceptional circumstances in the Act.

However, there were still issues. In 2009 Bullock et al found that larger orders take longer to pay off and the researchers thought that this was not surprising as it could be assumed that it would take longer to liquidate a larger number of assets and some asset types,

[1023] Working Group Third Report (n 126) para 2.16.
[1024] Home Office Guide (n 4) 24.
[1025] *R v City of London Justices ex parte Chapman* (1998) 162 JP 359 (QB), (1998) 16 LS Gaz 23, a case about a confiscation order made under the DTOA 1986.
[1026] The unamended POCA 2002, s 11(1).
[1027] The unamended POCA 2002, 11(2)-(3).
[1028] The unamended POCA 2002, s 11(4)-(5).

explaining that a house would take longer to liquidate than a car.[1029] Other research shows that a longer time for payment is needed where a house needs to be sold to satisfy a confiscation order[1030] and this is the practical experience of the research author.

Bullock et al found that of orders paid in full in their research about 30 per cent were paid off within 30 days, 58 percent within three months and 78 per cent within six months. Disparity was found with larger orders. Looking at 1,065 orders paid in full between April and August 2006 they found that on average that orders between £1 and £100 were paid within 50 days; orders between £1,000 and £10,000 were paid within 99 days and orders between £100,000 and £1 million were paid within 188 days. However the researchers found that the six month time for payment period was often exceeded and it can take years for orders to be settled.[1031] In 2011 the Local to Global Report found that it takes 22 months to enforce a confiscation order on average, and even longer in high value cases.[1032] In addition the NAO Report in 2013 shows figures for confiscation orders that were outstanding for over 6 months to over 10 years.[1033]

The provisions allowing time for payment in POCA 2002 were curtailed by the SCA 2015 as section 11 POCA 2002 was amended to meet the concerns raised in the 2013 Serious and Organised Crime Strategy, and the commitment in the Strategy to strengthen POCA 2002 by 'significantly reducing the time that the courts can give offenders to pay confiscation orders.'[1034] The new wording of section 11(1) POCA 2002 is different to the old version of section 11(1). It now reads "Unless subsection (2) applies, t*he full amount ordered to be paid* under a confiscation order must be paid on the day on which the order is made.' (emphasis added) This is a subtle change of wording as the requirement to pay in the unamended version of section 11(1) POCA 2002 was 'The amount…must be paid

[1029] Bullock and others (n 29) 12.
[1030] Wood, Enforcing Criminal Confiscation Orders (n 2) 8. Hopmeier and Mills (n 675) 459.
[1031] Bullock and others (n 29) 12.
[1032] Local to Global (n 224) 19.
[1033] NAO Report (n 71) Figure 15, 37.
[1034] 2013 Serious and Organised Crime Strategy (n 62) 35. Explanatory notes to the Serious Crime Act 2015, para 32. Sahota and Yeo (n 909).

on the making of the order'. The explanatory notes to the SCA 2015 explain that the change is intended to make it clear that the full amount must be paid on the day the confiscation order is made unless the court orders otherwise.[1035]

Both versions of section 11 also allow the Crown Court to extend time for payment, but in the new section, the test has changed. The initial period can now only be extended for up to 3 months and can be extended up to 6 months in total if the defendant cannot pay 'despite having made all reasonable efforts' to do so.[1036] The prosecution must still be given the opportunity to make representations.[1037]

Of particular note is the fact that different time for payment periods can now be granted for different amounts. The example given in the explanatory notes to the SCA 2015 is:

> For example, if the full amount is £1 million, the court might order £500,000 to be paid immediately (if the defendant has that amount available in cash), £200,000 within 28 days (if the defendant has shares worth that amount) and £300,000 within three months (if the defendant has property worth that amount).[1038]

As under the previous section 11 the defendant can apply to extend the time for payment during the period set by the Crown Court. Mirroring the position on imposition the new section 11 allows the Crown Court to grant different periods for different sums. Again, there is an example in the explanatory notes:

> for example, if the defendant had been ordered to pay £150,000 within 14 days and makes an application to the court for extending that time period, the court may order that £50,000 be paid immediately, provide a further seven days for another

[1035] Explanatory notes to the Serious Crime Act 2015, para 33.
[1036] POCA 2002, s 11(3)-(5).
[1037] POCA 2002, s11(8), the previous provision was sub-section (7) of the unamended section 11.
[1038] Explanatory notes to the Serious Crime Act 2015, para 34.

£50,000 to be paid over and a further 14 days for the remaining £50,000 to be paid over.[1039]

As a result there are three regimes relating to time for payment that the magistrates' court needs to be aware of when enforcing confiscation orders: the first for pre-POCA 2002 orders, the second for POCA 2002 orders (pre June 1, 2015) and the third for POCA 2002 orders (post June 1, 2015). In addition, post June 1, 2015, the confiscation order can contain different time for payment periods within it.

The unlimited time for payment in the pre-POCA 2002 legislation was introduced because the provisions were based on the fines-based legislation but these do not suit the enforcement of confiscation orders especially where the Crown Court has identified the assets to be used to satisfy the order. The move to reduce time for payment makes sense from a policy point of view. It meets the aims identified in this thesis by requiring the defendant to realise assets and pay the order more quickly. This should mean that collection rates improve and that the use of those assets by the defendant are disrupted. It would also meet the overall aim of ensuring that crime does not pay and count as a success.

Sometimes assets have been identified at the Crown Court, or it is a hidden assets case. Either way the defendant should be able to realise assets and pay the order quickly. Practically the reduction in the time allowed for payment is an improvement in the confiscation regime. The unlimited time for payment in the pre-POCA 2002 legislation, and the lengthier period when POCA 2002 was introduced gave defendants more opportunities to delay payment and a lengthy time for payment leads to three problems for the magistrates' court. Firstly, enforcement cannot take place until the time for payment has expired, and so the magistrates' court is helpless to enforce the order of the Crown Court during that period. Secondly a lengthy time for payment can mean that the value of the assets identified can reduce, so by the time the magistrates' court can act the

[1039] ibid para 36.

realisable value will not pay off the order. This can then result in further applications to the High Court or Crown Court to reduce the confiscation order,[1040] or leave an amount that is unenforceable and accruing interest. The third practical problem is that it gives the defendant more time to dissipate the assets which limits the powers of the court to enforce the order.

Whilst a reduction in the time for payment provisions make some sense, it adds to the complexity of an already complicated system. The magistrates' court now has to enforce confiscation orders made under legislation with different maximum times for payment, and since June 2015 can be enforcing one order with different time for payment for different sums as part of the total. The reduction in the time for payment in the new section 11 of POCA 2002 reduces the opportunity for dissipation and for a reduction in value, but these can still happen within the period set for payment.

Hopmeier and Mills see the change as a positive one as it gives tighter control over the defendant and coupled with consequences of the accrual of interest and the threat of the activation of the default term will lead to better enforcement.[1041] However, in practice the changes in the time for payment provisions do not in themselves give the magistrates' court any additional powers and the reduction in time is not enough in itself to assist the magistrates' court to enforce orders. It is unfair for the system to place further complexity on the ability of the magistrates' court to enforce without helping the court with more effective methods of enforcement.

The main recommendations in this thesis are for the Crown Court to make orders on imposition in relation to assets identified there, and the Crown Court will have all the necessary details to make the order. Rather than making the confiscation order then stopping and sending the confiscation order to the magistrates' court for enforcement, it is

[1040] An application for variation or discharge has to be made to the Crown Court for confiscation orders made under POCA 2002, and to the High Court for orders made under the pre-POCA 2002 legislation.
[1041] Hopmeier and Mills (n 675) 459-460.

recommended that the Crown Court should identify both the appropriate time for payment and make any orders needed to secure the asset as well as giving the magistrates' court the powers necessary to realise the asset if the defendant does not pay as ordered. The Crown Court can already secure assets and give powers to a receiver if a restraint order is needed, but this thesis argues for alternatives to restraint. In particular it is recommended that the Crown Court should be able to make payment orders[1042] and charging orders.[1043]

This would mean that time for payment in relation to a house could be linked to a confiscation charging order and in relation to cash in a bank account could be linked to a payment order. To use an example, if a confiscation order is made in the sum of £500,000 and the Crown Court identifies £100,000 in a bank account and £400,000 equity in a house then it could allow time for payment of (x) days for the cash to be realised from the bank account with an interim payment order; and time for payment of (x) months for the house to be sold with an interim charging order.

5.3 Interest

The first thing that happens if a confiscation order is not paid as ordered is that interest accrues, which can now be at different times for different amounts in the same confiscation order made under POCA 2002. The rate of interest is the same as that for the time being specified in section 17 of the Judgments Act 1838[1044] and the current rate of interest is 8% per annum. In both the old and new section 11 POCA 2002 no interest is payable during the period of the application to extend the time for payment period, however, interest will now accrue on any amounts not subject to the application.[1045]

[1042] That is, for confiscation orders made under POCA 2002 and the previous legislation.
[1043] That is, for the charging order provisions in the pre-POCA 2002 legislation to be extended.
[1044] CJA 1988, s 75A(3); Criminal Justice (International Co-operation) Act 1990, s 15(1); DTA 1994, s 10(3); POCA 2002, s 12(2).
[1045] POCA 2002, s 12(3) as amended by the SCA 2015.

Once interest accrues it must be treated as part of the confiscation order[1046] which in practice means that the confiscation order is not satisfied until the original order and any interest has been paid in full, and the magistrates' court cannot make an order that the defendant is not liable to pay interest. This interpretation has been held to be compatible with A1P1 of the ECHR.[1047]

The accrual of interest was not a part of either the DTOA 1986 or the CJA 1988 when enacted. The accrual of interest on unpaid drugs offences was first introduced in the Criminal Justice (International Co-Operation) Act 1990 and was introduced to ensure that the DTOA 1986 complied with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,1988 (the Vienna Convention). The provision that interest would accrue if a confiscation order was not paid when ordered was recommended as an amendment to the DTOA 1988 by the HAC Seventh Report[1048] and was introduced[1049] to bring the DTOA 1986 into line with the law of the other signatories of the Vienna Convention. It provided for interest to accrue after the time for payment had expired and for the interest to be treated as part of the confiscation order for the purposes of enforcement.

At that stage, the interest provisions were not identified as an enforcement measure but as necessary to rectify the drug trafficking legislation to ensure that the maximum amount of the proceeds and income from drug trafficking was confiscated.[1050] A provision to provide for the accrual of interest in relation to general crime confiscation orders was inserted into the CJA 1988 by POCA 1995 but by then the provision was considered to be an enforcement measure. The aim was to ensure that a defendant does not benefit from

[1046] Criminal Justice (International Co-operation) Act 1990, s 15(1); CJA 1988, s 75A(1)(b); DTA 1994, s 10(1); POCA 2002, s 12(4).
[1047] *Hansford* (n 525).
[1048] HAC Seventh Report (n 129) xix.
[1049] by section 15 of the Criminal Justice (International Co-Operation) Act 1990.
[1050] HL Deb 22 January 1990, vol 514, cols 888-889.

any interest on the accrued account and was introduced to echo the drug trafficking legislation.[1051]

The DTA 1994 was a consolidating Act and it included the amendments to the DTOA 1986 made by the Criminal Justice (International Co-Operation) Act 1990 including the provisions about interest which were replicated in POCA 2002. The prosecution has the power to apply to the Crown Court to increase the default sentence if the increase in interest results in an increase in the maximum term applicable[1052] but this is rarely done in practice.

Others have identified that interest is ineffective as an enforcement sanction for the non-payment of confiscation orders[1053] and that there are substantial amounts in the overall outstanding sums attributable to interest.[1054] However, this research analyses different issues in relation to interest, namely the problems for judges interpreting the rules in relation to activating the default term where interest has accrued; and the implications for the magistrates' court when enforcing interest following the case of *Gibson*.[1055]

5.3.1 Interest: Impact on the magistrates' court

The rules for the magistrates' court dealing with accrued interest and activating the default term have changed due to *Gibson*. Until 2018 interest was included in the calculation of

[1051] HC Deb 3 February 1995, vol 253, col 1325.
[1052] Criminal Justice (International Co-operation) Act 1990, s 15(2); CJA 1988, s 75A(2); DTA 1994 s 10(2); POCA 2002, s 39(5).
[1053] For example, Hopmeier and Mills question whether it is an effective sanction, (n 675) 460-461. Review documents have concluded that the sanction does not work, NAO Report (n 71) 41; PAC Report (n 328) 5, 12; Wood's conclusions on the default sentence also caused her to question the accrual of interest as an incentive to pay Wood, The Big Payback (n 5) 9.
[1054] Coupled with the interest that accrues on non-payment, amounts outstanding have increased substantially despite an increase in amounts recovered. The review documents show that by April 2015 £432 million of the outstanding confiscation order figure of £1.6 billion was interest, Wood, Enforcing Criminal Confiscation Orders (n 2) 14. By the time of the HAC 2016 Report the interest figure was £470 million which was nearly a third of the total confiscation debt of £1.61 billion, HAC 2016 Report (n 26) 3, 38. The HMCTS Trust statement 2017-18 puts the outstanding interest figure at £657,595 million out of a total figure outstanding of over £1.9 billion, HMCTS Trust Statement 2017-18 (n 23) 13.
[1055] *Gibson* (n 12).

the default term by the magistrates' court, which in itself had caused complications for the magistrates' court and judges attempting to interpret the legislation.

The issues have arisen because of the interpretation of section 79 MCA 1980 which requires the magistrates' court to take part payments into account when activating a default term.[1056] This is a provision which was introduced to deal with the non-payment of fines not confiscation orders and in a case on the enforcement of confiscation orders has been described as 'exceedingly badly drafted' and not 'easy to apply.'[1057]

Prior to 2018 the rules for dealing with the interaction of part payments when interest had accrued were not clear. Magistrates' courts would calculate the default term taking both into account and the process had been described as working with:

> something akin to a measuring jug. It has a fixed capacity which cannot be exceeded, but within it the amount of the debt may both fall as the capital sum is paid off and rise as interest accrues on the balance. When [the justices] come to activate a default term, [they] must activate the same proportion of it as the amount in the jug - that is principal and interest together - bears to its capacity.[1058]

In 2018 the Supreme Court in *Gibson* considered the rules in relation to the activation of the default term where the defendant had made a part payment and interest had accrued. The Supreme Court said that 'it is trite, but important, to say…that the question is not what scheme might be thought desirable, but rather what the convoluted statutes actually mean'.[1059] This case is important not only for the clarification it gives on how the magistrates' court should deal with cases where time for payment has expired and interest has accrued at the time the default term is activated, but also because it means that in the context of this research it confirms the complexities of the rules governing the magistrates'

[1056] MCA 1980, s 79.
[1057] *R (on the application of Emu) v Westminster Magistrates' Court* [2016] EWHC 2561 (Admin) [8] (Collins J).
[1058] *Crown Prosecution Service v City of London Magistrates' Court and Hartley* [2007] EWHC 1924 (Admin) [7] (Sedley LJ).
[1059] *Gibson* (n 12) [3].

court powers of enforcement and, as a result, it is argued that this is an area where further research is needed.

The court had to consider the interest provisions in section 10 DTA 1994 but explained that the judgment it is not just of historical interest because, although the wording of POCA 2002 is not identical, the same issues apply in POCA 2002[1060] and it is submitted applies to all confiscation orders made under all Acts. The court reasoned that if the interest provisions in DTA 1994[1061] were taken in isolation, there would be a powerful argument for saying that interest is simply added to the original confiscation order. However, the court then had to consider the 'much more complex statutory scheme' for activating the default term for confiscation orders.[1062]

Of particular note to this research, the court heard argument that civil enforcement of interest is unlikely to be effective in the case of a defendant who is in default of the principal sum of the confiscation order.[1063] The Supreme Court gave definitive guidance on the interest point, namely that the interest is not taken into account when calculating periods of detention. This was despite the 'purposive' arguments put forward on behalf of the Secretary of State for Justice.[1064] It took into account the principle that penal legislation is to be construed strictly, particularly when it involves deprivation of liberty.[1065]

The Supreme Court held that the correct interpretation of the rules means that section 79(2) does not include interest as the subsection means that the magistrates' court must consider the amount outstanding at the time the confiscation order was imposed, that is without interest, which must be the correct interpretation. The Supreme Court reasoned that section 79 was not drafted with confiscation orders or Crown Court fines in mind, and

[1060] ibid [2].
[1061] DTA 1994, s 10. Equivalent provisions are contained in Criminal Justice (International Co-operation) Act 1990, s 15; CJA 1988, s 75A; POCA 2002, s 12.
[1062] *Gibson* (n 12) [8].
[1063] ibid [19].
[1064] ibid [19]-[20].
[1065] ibid [21].

if it is intended that interest should be included in the calculation of the default term then legislative amendment is needed.[1066]

In coming to this conclusion, the Supreme Court considered the way the confiscation legislation and the fines based powers of the magistrates' court interact, which it described as a 'process of successive referrals'.[1067] It described the process under the DTA 1994 although the 'referrals' would be the same under the other confiscation Acts.[1068] The Court described how section 9 DTA 1994 refers to a confiscation order being enforced as if it is a fine imposed by the Crown Court by referring on to section 140(1) PCC(S)A 2000 and therefore enforceable by the magistrates' court, but that the magistrates' fines based powers are contained in the MCA 1980 and so there is a further referral to that Act.[1069] The judgment explains that many of the difficulties in the case arise from applying statutory provisions to the enforcement of confiscation orders which were not designed for them.[1070]

Some of the background points in the judgment are not accurate. The judgment states that the fact that confiscation orders carry interest makes them unique[1071] but in fact there is one other financial penalty which carries interest when it is not paid as ordered.[1072] In another part of the judgment it was stated that the magistrates do not fix a default term when imposing a fine,[1073] however a magistrates' court can set a default term on the imposition of a fine if the grounds in section 82(1) MCA 1980 are made out.[1074] It is also worthy of note that the Court had to refer to the version of section 79 MCA 1980 which was relevant at the time, but it too has now been amended.[1075] However, it matters not to

[1066] ibid [23].
[1067] ibid [11].
[1068] Prior to section 140 PCC(S)A 00, the relevant provision was PCCA 1973, s 32.
[1069] *Gibson* (n 12) [11].
[1070] ibid [12].
[1071] ibid [5].
[1072] An unpaid unlawful profit order made under the Prevention of Social Housing Fraud Act 2013, s 4 also accrues interest at the same rate as a confiscation order. It is within the knowledge of the research author that this is a little used order.
[1073] *Gibson* (n 12) [12].
[1074] Although in the experience of the research author this does not happen very often in practice.
[1075] *Gibson* (n 12) 11.

the decision of the Supreme Court. It does though support the finding of the Supreme Court that the rules are complex, and it is submitted is an area for further research.

The interpretation of the rules in relation to activating the default term where interest had accrued and there had been part payment were ripe for clarification by the Supreme Court as there had been a lack of clarity in this area of law. However, as the SCA 2015 altered the default terms as well as the time for payment, with the knock-on effect on the accrual of interest, the factors that the magistrates' court must take into account when enforcing a confiscation order have become more complicated.

The decision in *Gibson* does not stop an application by the prosecution to apply to the Crown Court to increase the default sentence if the increase in interest results in an increase in the maximum term applicable.[1076] But previous research shows that this is rarely done[1077] which is the experience of the research author.

The magistrates' court must enforce all elements of the confiscation order including interest. It is vital that there are effective powers of enforcement available to the magistrates' court for all elements of the order but as a result of *Gibson,* the magistrates' court will be restricted to civil means of enforcement to enforce the interest, unless the prosecution apply for an increase in the default term to cover the amount of the interest. The magistrates' court already has to consider civil means of enforcement before activating the default term and is restricted to civil means of enforcement for any outstanding part of the principal amount of the confiscation order if the defendant has served the default term and the order has not been satisfied in full.[1078]

The application of section 79 MCA 1980 to the interest element of a confiscation order is another area suitable for further research and possible legislative amendment which could

[1076] Criminal Justice (International Co-operation) Act 1990, s 15(2); CJA 1988, s 75A(2); DTA 1994 s 10(2); POCA 2002, s 39(5).
[1077] Brown and others (n 173) 13.
[1078] The civil means of enforcement are the powers of the magistrates' court short of committal, *Lloyd* (n 530) [17].

include a provision in section 35 POCA 2002 to allow for the enforcement of interest by the use of the default term. There would also be a need for a corresponding amendment to the pre-POCA 2002 legislation.

In any event the case of *Gibson* adds weight to the argument that more effective civil enforcement powers should be available to the Crown Court including the introduction of confiscation charging orders and payment orders to make the magistrates' court collection and enforcement more effective. This would assist either by ensuring that assets are realised promptly to prevent interest accruing or, if interest does accrue, in ensuring the enforcement of a confiscation order including interest by means other than the default term.

5.4 Cash in a bank or building society account

This section concerns money held in a bank or building society account, but for ease will refer to a bank account. There are also powers in relation to seized monies,[1079] but these fall outside the focus of this research.

Sometimes a defendant will sign a consent order permitting the transfer of money from a bank account to pay a confiscation order.[1080] In the pre-POCA 2002 legislation, the only way that money can be taken from a bank account without the defendant's consent is by way of an application in the county court by the designated officer for the magistrates' court for what was known as a garnishee order and is now a third party debt order. There were issues with this and as a result payment orders were introduced in POCA 2002 as an alternative to a garnishee order[1081] and have been described as a 'unique power' for the magistrates' court[1082] which they are as there is no similar power for other financial penalties.

[1079] Where the money has been seized and is being held in connection with a prosecution or investigation, POCA 2002, s 67(2).
[1080] Joint Thematic Review (n 3) 44.
[1081] Explanatory Notes to the Proceeds of Crime Act 2002, para 121.
[1082] *Mitchell Taylor and Talbot* vol 2, para VII.007 (R5: September 2004).

Financial Investigators have identified bank accounts as an asset which can be dissipated very quickly and therefore suitable for restraint,[1083] and that restraint is particularly useful where the asset involved is a bank account.[1084] As a result it is not surprising that Bullock et al found that cases where there is money in bank accounts or houses are the 'likeliest candidates' for restraint.[1085]

5.4.1 Pre-POCA 2002 legislation

A third party debt order replaced a garnishee order as an order in 2002,[1086] but the nature of the order remains the same.[1087] Any reference to a garnishee order in the review documents or case law applies to a third party debt order and vice versa unless mentioned otherwise in this thesis.

The Home Office Guide suggested that garnishee orders are particularly effective if the money is held in a bank account and there is a restraint order in force[1088] but there were criticisms of the process. The Working Group Third Report recommended that the legislation should be amended to make it clear that the power to garnishee is available once default is made in payment,[1089] and also recommended that a new power should be introduced for money to be paid to what is now the designated officer for the magistrates' court.[1090] The Hodgson Committee had already identified that it was wrong for a victim to be able to apply to restrain a bank account in civil proceedings to ensure that damages can be paid when the State does not have the same right.[1091]

[1083] Bullock, 'Enforcing Financial Penalties' (n 44) 332.
[1084] Bullock and others (n 29) 19.
[1085] Bullock and others (n 29) 21.
[1086] The Civil Procedure Rules (CPR) Part 72 came into force on 25 March 2002 replacing garnishee orders with third party debt orders.
[1087] *Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation and others* [2003] UKHL 30, [2004] 1 AC 260 [12] (Lord Bingham of Cornhill).
[1088] Home Office Guide (n 4) 25.
[1089] Working Group Third Report (n 126) para 2.36.
[1090] The Working Group recommended that there should be a new power for payments in a bank account to be paid directly to the justices' clerk to supplement distress warrants, Working Group Third Report (n 126) para 2.39.
[1091] Hodgson Report (n 123) 107.

The Working Group Third Report found that there was a reluctance by the magistrates' court to use garnishee proceedings because of the cost.[1092] It recommended that the costs incurred by the magistrates' court making an application in the county court, which would include the county court fees and any solicitors' costs, should be taken from monies paid in relation to the confiscation order before it is paid to the consolidated fund by modelling the legislation on the legislation in relation to receivers' fees.[1093]

The time for payment provisions have tightened over time which should lessen the ability of the defendant to dissipate assets and protect the value of assets to a certain extent. However, without a restraint order, there is no preservation of the money in the bank account. The Working Group Third Report recommended in 1998 that if monies were held in a bank account then time for payment should be immediate.[1094] This was echoing the recommendations in relation to garnishee already made by the Working Group First Report which found the 'tortuous' process for the justices' clerk to apply to the county court for a garnishee order led to a reluctance to use the power.[1095] It recommended the introduction of a power of the Crown Court to make an order on imposition which would have had the effect of a garnishee order nisi. The ambition would be that the order would become absolute automatically after a set period unless the bank or whoever it was addressed to shows why it should not become absolute. The order would be enforced by the magistrates' court.[1096] The recommendation was one of those in the report aimed at improving the enforcement powers of the magistrates' court, by suggesting that the Crown Court should give clear instructions to the magistrates' court about how the confiscation order should be enforced.[1097]

[1092] Working Group Third Report (n 126) para 2.33.
[1093] ibid paras 2.33-2.36.
[1094] ibid para 2.16.
[1095] Working Group First Report (n 137) 8.
[1096] ibid 8-9.
[1097] ibid 8-9. The second recommendation was that a similar power to a distress warrant would be introduced; the third was in relation to the appointment of receivers which is no longer relevant.

The PIU report recommended the use of an order on imposition which would have the effect of transferring money in a bank account where there is a restraint order, as it saw the inability to do this as disrupting and delaying the enforcement process and that restraint is not the most direct way of satisfying the order.[1098]

The recommendations in the PIU report led directly to the introduction of powers for the magistrates' court to make a payment order, but it is not a direct method of satisfying the confiscation order and, it is submitted, the order did not go far enough. The Crown Court gathers enough information to make a payment order, but then passes the case to the magistrates' court to make the order which in practical terms comes with inbuilt delay and an additional administrative burden. Had POCA 2002 introduced powers for the Crown Court to make a payment order on imposition, it would have addressed a need first identified in the Working Group First Report to speed up payment and remove unnecessary administration.

5.4.2 POCA 2002 and the introduction of payment orders:

Payment orders were introduced in s 67 POCA 2002 as an alternative to garnishee but have been amended on a number of occasions since.[1099] A payment order can be made in relation to money seized and detained by a constable or other person but only where the confiscation order was made under POCA 2002. This thesis concentrates on the issues for the magistrates' court when the money is held in a bank account.

The order is made by the magistrates' court and directs the bank to pay an amount to the designated officer for the magistrates' court. If a payment order is made by the magistrates' court and the bank does not comply with it then the court can order the bank to pay a sum of up to £5000, which is then enforced as a fine.[1100] When the provision was

[1098] PIU Report (n 117) 71.
[1099] The payment order provisions in POCA 2002, s 67 have been amended on four occasions. The changes relevant to this research were made by the SCA 2015.
[1100] POCA 2002, s 67(6).

first introduced, there were four conditions which had to be satisfied before a payment order could be made. They were that:

- a restraint order had been made in relation to money,
- a confiscation order had been made,
- an enforcement receiver has not been appointed, and
- time for payment had expired.

There were issues with this order which were helpfully outlined in articles by Gardner[1101] and Brunning[1102] who both recommended that there should be no need for time for payment to have expired before a payment order could be made.[1103] Brunning identified difficulties if the account was not in the defendant's name;[1104] and these were addressed by the changes brought in by the SCA 2015 so if a determination has been made about a defendant's interest under section 10A POCA 2002 then the magistrates' court can make a payment order in relation to an account which is not in the name of the defendant.

Brunning estimated that at least 20 per cent of confiscation orders with monies in bank accounts did not have a restraint order and suggested an amendment to section 67 so that there was no requirement for a restraint order to be in force.[1105] POCA 2002 was also amended by the SCA 2015 to remove the need for a restraint order to be in place before a payment order can be made in the magistrates' court,[1106] and since 1st June 2015 only two grounds have to be satisfied before the magistrates' court can make a payment order, namely that:

- a confiscation order has been made against person holding money, and

[1101] David C. Gardner, 'Closing Loopholes to Take the Cash Out of Crime: Practical Changes in Legislation to Improve Confiscation Order Enforcement' [2009] (2) Crim LR 90.
[1102] Brunning, 'Payment Orders in Confiscation Order Enforcement' (n 59).
[1103] Gardner (n 1101) 93; Brunning, ibid 685.
[1104] Brunning, ibid 685.
[1105] ibid 684-685.
[1106] POCA 2002, s 67(4) was removed by SCA 2015, s 14(1).

- a receiver has not been appointed.[1107]

This change met the commitment in the 2013 Serious and Organised Crime Strategy to strengthen POCA 2002 by 'significantly reducing the time that the courts can give offenders to pay confiscation orders, including rapid confiscation of cash held in bank accounts'.[1108] These changes addressed some of the problems with payment orders that Gardner and Brunning had identified, but do not address the issues raised with the pre-POCA 2002 legislation. In addition they do not meet the purpose of POCA 2002 to create a one stop shop at the Crown Court in relation to confiscation orders, nor do they stop the ability to move the money out of the bank account before the payment order is made. Finally, they do not meet the need to make an order on imposition first suggested in 1991 by the Working group First Report and then again in 2000 by the PIU.

One of the issues identified by Gardner in relation to payment orders is that if a confiscation order is being made at the Crown Court and a bank account has been identified as an asset, that court would have all the information required for a payment order. That information is then passed to the magistrates' court for a payment order to be made.[1109] In 2009 when Gardner was writing he identified that the grounds a county court would consider in relation to a third party debt order would already have been identified by the Crown Court in relation to restraint as a restraint order was a pre-requisite for a payment order under the legislation at that stage. He argued that when making a confiscation order a third party debt order application would be unnecessary work for the courts.[1110]

Before making a payment order the magistrates' court must have received the confiscation order from the Crown Court and then it gives the bank notice. Even though time for payment no longer has to expire before an application for a payment order can be

[1107] POCA 2002, s 67(5) as amended.
[1108] 2013 Serious and Organised Crime Strategy (n 62) 35.
[1109] Gardner (n 1101) 93.
[1110] ibid 93.

made, there is an in-built delay in the process. If there is no restraint order, then there is the opportunity for the defendant or a third party to dissipate the money in the bank account. As a confiscation order is an order against the person and not the asset, there is nothing to stop the dissipation, neither is there a sanction if dissipation takes place unless there is a restraint order.

If a payment order is made, then the order will contain information[1111] which will be in the knowledge of the Crown Court if the bank account has been identified as an asset when the confiscation order is made. The order requires the bank to pay the money within 7 days unless the magistrates' court fixes a different period of time.[1112]

5.4.3 Payment order v third party debt order

One of the recommendations in this thesis is for changing the payment order provisions which replaced applications for third party debt orders.[1113] In chapter 7 applications made by the designated officer for charging orders made in the county court are analysed, which are similar in nature to applications for third party debt. Because of this, it is necessary to analyse applications for a third party debt order by the designated officer in the county court. In addition, the review documents identified problems with the process for applying for a third party debt order which led to the introduction of the payment order provisions, and this thesis shows that not all the issues have been addressed. The analysis of the third party debt applications is not just of historical importance because an application for an order to the county court is the only option available to the magistrates' court where the

[1111] The information which must be contained in the order is a requirement of CrimPR 33.24 and includes the name of the person against whom the confiscation order has been made, the amount outstanding, details of the branch and sort code and the account details (if known), the amount to be paid.
[1112] CrimPR 33.24(1)(h).
[1113] The payment order provisions are only available for confiscation orders made under POCA 2002. For bank accounts identified under the pre-POCA 2002, the only application which can be made by the designated officer is for a third party debt order in the county court.

confiscation order has been made under the pre-POCA 2002 legislation. Like the rest of this section, the analysis concentrates on applications in relation to bank accounts.[1114]

It has been said that applications for third party debt orders are likely to be sought less frequently because of the payment order provisions,[1115] and while this is undoubtedly correct, the experiences of the research author are that applications are still necessary in relation to pre-POCA 2002 bank accounts. This is because confiscation orders are still being made under the pre-POCA 2002 legislation, and others are still being enforced.[1116] However, there have always been deterrents to the magistrates' court applying, namely the costs involved and the difficult process.[1117]

The designated officer for the magistrates' court cannot apply for a third party debt order in relation to an outstanding confiscation order until the time for payment granted by the Crown Court has expired.[1118] This is an inbuilt delay and therefore there is a risk of dissipation. As the debt is a confiscation order, there is no need for the magistrates' court to conduct a means inquiry before the designated officer makes an application for a third party debt order.[1119] This is a benefit within the context of the magistrates' court procedure, but once the application is made, the procedure in the county court is far from straightforward and the designated officer is treated like any other judgment creditor.

The confiscation order can be enforced in the county court, but the debt must first be registered at the county court[1120] before the application for an interim third party debt order can be made[1121] and the designated officer must pay of a fee of £110.[1122] As Gardner

[1114] There is a separate procedure for an application for money in court in CPR 72.10 which falls outside the scope of this thesis.
[1115] Sutherland Williams, Hopmeier and Jones (n 58) 284.
[1116] text to n 78 in chapter 1.
[1117] Working Group Third Report (n 126) para 2.33.
[1118] DTOA 1986, s 6; CJA 1988, s 75; DTA 1994, s 9; POCA 2002, s 11 (n 849).
[1119] DTOA 1986, s 6(4)(b); CJA 1988, s 75(5)(b); DTA 1994, s 9(4)(b); and POCA 2002, s35(3)(c) disapply the MCA 1980, s 87(3) which means that there is no need for the magistrates' court to conduct a means inquiry before making an application to the High Court or county court.
[1120] using form N322B, 70 PD 4.1.
[1121] using form N349, 72 PD 1.1.
[1122] The Civil Proceedings Order 2008, SI 2008/1053 sch 1 Fee 7.3(a).

identified, the designated officer must provide information to the county court[1123] which the Crown Court would have been in possession of when the confiscation order was made if the bank account had been identified as an asset.[1124]

When an application for a third party debt order is made, it will be dealt with by a judge without a hearing who may make an interim order, which prevents the bank from making any payments which would reduce the amount in the account to below the amount of the order.[1125] Interim orders are made without notice and are usually listed the day they are received as urgent business.[1126] The case will be adjourned for a hearing not less than 28 days after the interim third party debt order is made.[1127]

In order for an application to be made the third party must be within the jurisdiction.[1128] In relation to a payment order, the bank must have its head office or a branch in the United Kingdom.[1129] The third party debt order is discretionary[1130] and if an interim order is made it must be served on the defendant and the bank[1131] which must then carry out a search of the accounts and disclose relevant information including how much is in the account(s) with the account number(s), or if there are no accounts. Like a payment order the time limit for the bank to respond is 7 days.[1132]

[1123] The information the designated officer must provide is required by Practice Direction 72 (72 PD 1.2) and includes: the name and address of the defendant, the details of the confiscation order including the amount outstanding, the name and the address of the bank branch where it is believed the account is held, the account number (or to state if it is not known), confirmation that to the best of their knowledge or belief the third party is within the jurisdiction; and owes the money to or holds money to their credit. In addition, the application must include the details of any other person with a claim to the money and any other applications for third party debt orders for the same debt.

[1124] Working Group First Report (n 137) 8; Gardner (n 1101) 93; text to n 1109.

[1125] CPR 72.4(2)(b).

[1126] Sir Geoffrey Vos (ed) *Civil Procedure 2018: The White Book* (Sweet & Maxwell 2018) Vol 1, 2180.

[1127] CPR72.4(5).

[1128] CPR72.1(1).

[1129] POCA 2002, s 67(8)(b); Building Societies Act 1986, s 5.

[1130] Vos (n 1126) vol 1, 2185.

[1131] CPR 72.5(1).

[1132] CPR 72.6.

Both the defendant or the bank can then make objections at the final hearing.[1133] Although in most cases the hearing is straightforward,[1134] if the designated officer loses the case they will be liable for costs.[1135] The designated officer can be awarded the costs of the application out of the money in the account.[1136]

Once an interim third party debt order has been made the defendant can apply for a hardship payment order,[1137] which has been described as an 'innovation' of the Civil Procedure Rules and an attempt to balance the rights of the judgment debtor and the judgment creditor.[1138] The power exists in relation to third party debt order applications made in relation to unpaid confiscation orders even though the Crown Court has already assessed that the defendant has benefited from crime in the amount of the confiscation order and, if the money in the bank account was identified as an asset at the Crown Court, has already determined it can be paid to satisfy the confiscation order. The application for a third party debt order can be transferred to another court.[1139] Given this process and the costs involved, it is understandable that the Working Groups found a reluctance by justices' clerks to make such applications, and in practice applications for third party debt orders are rarely made.

A review of both payment orders and third party debt order processes show that without a restraint order there is nothing to prevent the dissipation of the money in a bank account before an order is made. In both situations the Crown Court would have the information needed to make an order if the account has been identified as an asset at the Crown Court. A bank account has also been identified as an asset particularly suitable for restraint.[1140]

[1133] CPR 72.8.
[1134] Vos (n 1126) vol 1, 2184.
[1135] ibid Vol 1, 2184.
[1136] CPR 72.2. and 72.11.
[1137] CPR 72.7.
[1138] Vos (n 1126) vol 1, 2183.
[1139] 72 PD 4.
[1140] Bullock and others (n 29) 21; Bullock, 'Enforcing Financial Penalties' (n 44) 332.

Therefore, it is suggested that passing the responsibility for making a payment order or an application for a third party debt order to the magistrates' court leaves the money in the account at risk of dissipation. For payment orders, this appears to be an unintended consequence of removing the requirement for there to be a restraint order before a payment order can be made. It also, especially in the case of an application for a third party debt order, costs time, resources and money in fees and representation, and is the opposite of the one stop shop approach envisaged by the introduction of POCA 2002. If the account has been identified as an asset at the Crown Court, that court will have all of this information and would be in a position to make an interim order, rather than passing it to the magistrates' court to consider.

Of course, the bank account could be identified as an asset at a later date so there would need to be a mechanism for a payment order to be made at a later date, not just on imposition. This could be an order available to the Crown Court who may also need to make other orders in relation to the confiscation order at the same time, for example a compliance order,[1141] with the retention of the power for the magistrates' court on enforcement.

It is therefore recommended that consideration should be given to amending the payment order provisions to avoid any risk of dissipation and provide a real alternative to restraint. This would strengthen the powers of collection of the magistrates' court for confiscation orders made pre and post POCA 2002. As a result, three recommendations are made in relation to bank accounts.

Firstly, that payment orders should be extended to the pre-POCA 2002 legislation in the same way as discharge under section 25A POCA 2002 has been.[1142] Secondly, that the

[1141] Fisher suggests that a compliance order would be a useful tool if an order is made to transfer money held in an offshore bank account into a local bank account, Fisher (n 60) 759.
[1142] The Crown Court can now discharge a confiscation order made under any legislation where the defendant has died and the order cannot be satisfied out of the estate.

Crown Court should be given the power to make a payment order on imposition.[1143] Thirdly the Crown Court and the magistrates' court should also have the power to make a payment order subsequent to the confiscation order being made. These recommendations to amend the payment order provisions would mitigate the cost considerations of restraint orders (and other issues) and it is suggested that Crown Court payment order powers should permit the court to make an interim payment order.

Gardner recommended that the Crown Court could be given the power to make a payment order as well as a magistrates' court, but that would in effect be an absolute order.[1144] The recommendations in this thesis build on the recommendations of the First and Third Working Group Reports. To bring these recommendations up to date, it would mean giving the power to make a payment order to the Crown Court. The Working Group First Report recommended an order nisi. In a similar way, it is recommended that on the imposition of a confiscation order where the bank account has been identified as an asset, the Crown Court could make an interim payment order with notice to the bank which, if nothing is heard, becomes absolute on a given date. If an objection is received a hearing could be arranged in the magistrates' court and until then the interim payment order would remain in place.[1145]

A recommendation is also made that the magistrates' court should retain its power to make a payment order for bank accounts which are identified after the confiscation order has been made. This would allow the magistrates' court to make a payment order when

[1143] Or on any other application in relation to the confiscation order, for example an application to vary.

[1144] Gardner (n 1101) 94.

[1145] These changes could echo the changes to the forfeiture of cash provisions brought into force on 1st June 2015. The Policing and Crime Act 2009 amended POCA 2002 by inserting new sections 297A to 297G. As a result, where cash has been detained, a forfeiture notice can be served instead of making an application to the magistrates' court for the forfeiture of the cash. If the notice is served and there is no objection, the cash is forfeited. If an objection is received, then a court hearing would be arranged. These provisions were brought into force because a considerable number of forfeiture applications are uncontested, Home Office *Amendments to the Proceeds of Crime Act 2002* (Home Office Circular 020/2015) para 80. The author is not aware of any applications for payment orders being contested by a bank in the magistrates' court.

considering other aspects of the enforcement of the order where necessary and retain in effect a one stop shop for the enforcement powers of the magistrates' court.

These proposals would mean that the risk of dissipation would be removed where the account is identified as an asset at the Crown Court, without the need for a restraint order. It is more proportionate than a restraint order which would prevent the defendant dealing with the account and the payment order would only take the amount assessed as an asset by the Crown Court. This meets the purposes of the regime including ensuring that crime does not pay, and disruption. It would also assist HMCTS which must ensure that all orders are enforced, whatever the amount of the order, or the legislation the confiscation order is made under. It also fits in with the one stop shop ideal of POCA 2002[1146] and is a proportionate answer to the issues identified.

5.5 Discharge

The amendments to the powers to discharge a confiscation order are an example of how issues identified in the pre-POCA 2002 have been addressed to create the one stop shop at the Crown Court envisaged by POCA 2002, even if those changes have come about in stages.

Slowly but surely the powers of the magistrates' court to apply to the Crown Court to discharge confiscation orders in limited circumstances have been extended, including by extending some of the powers to the pre-POCA 2002 legislation. It is suggested that the amendments are more in line with the one stop shop purpose of POCA 2002 and could be echoed in other parts of the regime.

There had been calls for the magistrates' court to be able to obtain a review of the order if it was unenforceable, and the Working Party Third Report recommended provisions that

[1146] The PIU report envisaged the Crown Court making orders in relation to restrained bank accounts, PIU Report (n 117) 71.

were enacted in POCA 2002.[1147] These powers only applied to confiscation orders made under POCA 2002 and when they were introduced the rules allowed an application by the designated officer to the Crown Court for a discharge of an unenforceable order if the amount remaining on the order is less than £1000 and this is because of exchange rate fluctuations,[1148] or is less than £50.[1149] A new section 25A was introduced into POCA 2002 by the SCA 2015, so now an application can be made if the defendant has died and it is not possible to recover anything from the estate of the deceased, or it would not be reasonable to make any attempt to recover anything.[1150] This new power also applied to orders made under the DTA 1994 and CJA 1998, but not the DTOA 1986.[1151] The CFA 2017 amended section 8 of the SCA 2015 which means that the powers in section 25A POCA 2002 to discharge a confiscation order where the defendant is deceased are extended to orders made under the DTOA 1986.

The powers to apply for a discharge make a real practical difference. They allow the orders to be completed when otherwise they would be showing as outstanding, accruing interest and increasing the overall debt unnecessarily. It also allows other collectable orders to be prioritised. Wood welcomed this measure as a practical response but questioned whether the increase in the ability to write-off confiscation orders went far enough.[1152] There have been calls to consider the ability to write-off unenforceable

[1147] Levi and Osofsky had mentioned the lack of an ability to write-off confiscation orders. Levi and Osofsky (n 162) viii. The Working Group Third Report recommended that the magistrates' court should be able to apply the Crown Court for a review of the amount to be paid under a confiscation order that was obviously unenforceable; and to be able to apply to remit confiscation orders in the case of fluctuations in exchange rates where the offender was subsequently deported, Working Group Third Report (n 126) paras 240-244.
[1148] POCA 2002, s 24.
[1149] POCA 2002, s 25.
[1150] POCA 2002, s 25A as inserted by SCA 2015, s 8(3). This was introduced because of the inability of the designated officer to apply to discharge the order if the defendant had died, Explanatory Notes to the Serious Crime Act 2015, para 49.
[1151] SCA 2015, s 8(3) as enacted.
[1152] Wood, The Big Payback (n 5) 12-13.

accounts[1153] and Wood called for this area to be the subject of further research[1154] although the HAC Report recommended that accounts should not be written off.[1155] This thesis supports the need for further research, which should consider extending all the powers to discharge in POCA 2002 to orders made under the pre-POCA 2002 legislation but this falls outside the scope of this thesis.

5.6 Applications for a Certificate of Inadequacy or Downward Variation

There is no power for the magistrates' court to remit a confiscation order[1156] although there has always been the power for the defendant to apply for the order to be reduced if there is a shortfall in the available amount. Levi and Osofsky described the helplessness of the magistrates' court to do anything if the defendant's solicitors failed to make an application[1157] and without the power for anyone else to apply orders remained outstanding which could have been reduced, often to a nil amount.

Like other provisions the process varies depending on whether the confiscation order was made under POCA 2002 or the pre-POCA 2002 legislation.[1158] This thesis concentrates on the parties who can make the application rather than the detailed process or the principles to be taken into account when reviewing the available amount.

[1153] For example, the evidence of Peter Handcock PAC Report Ministry of Justice Financial Management 2010-12 (n 350) Ev 12; HAC 2016 Report (n 26) 28. Levi suggests that writing off these sums would be a sensible policy, Levi 'Reflections on Proceeds of Crime' (n 38) 5.

[1154] Wood acknowledged that politically it may be difficult to allow more categories of orders to be written off but wondered if a system could be developed to 'park' orders, for example if defendants have been deported. The majority of the practitioners she interviewed gave removing uncollectable orders from the overall figures as the one change they would like to see in the enforcement process, Wood, The Big Payback (n 5) 12-13.

[1155] HAC 2016 Report (n 26) 30-31.

[1156] POCA 2002, s 35(3)(b).

[1157] Levi and Osofsky (n 162) 52.

[1158] When the power was first introduced only the defendant could apply to the High Court, DTOA 1986, s 14; CJA 1988, s83. When the DTA 1994 was introduced a receiver could also make an application, DTA 1994, s 17. CJA 1988 s 83 was amended by POCA 1995, s 10 so that both can apply. The power of the receiver and defendant to apply was continued in POCA 2002 but the application is made to the Crown Court.

If an application is made under POCA 2002, and the Crown Court finds that the available amount is inadequate, it 'may' vary the order the order by substituting 'such smaller amount as the court believes is just'.[1159] The use of the word 'may' in POCA 2002 abolishes the difficulty encountered under the old legislation.[1160]

When the power to make an application for a downward variation to the Crown Court was introduced in POCA 2002 the application could only be made by the defendant or a receiver, but section 23 POCA 2003 was extended by SCA 2015 so that the prosecutor can apply in addition to the defendant or receiver.[1161] The changes to the discharge and variation powers have been described as 'small' but 'eminently sensible.'[1162] However, since the changes in the SCA 2015, the NAO report found that although the prosecutor and defendant can apply for a variation, this does not always happen, for example if the defendant refuses to co-operate or has absconded.[1163]

The amendments to the variation powers did not go as far as those suggested by Gardner in 2009.[1164] Gardner outlined the difficulties that are experienced when the Crown Court makes a confiscation order in an amount based on a valuation of a particular item which is subsequently sold for a lesser amount.[1165] He suggested in his article that s23(1) should be amended to read:

(1) this section applies if

(a) the court has made a confiscation order, and

[1159] POCA 2002, s 23(3).
[1160] Where there is a pre-POCA 2002 confiscation order, an application for a Certificate of Inadequacy is made to the High Court. If successful, the Crown Court 'shall' then reduce the order by the amount it thinks 'just in all the circumstances of the case' DTOA 1986, s 14; CJA 1988, s 83; DTA 1994, s 17. In *R v James Briggs* [2003] EWCA Crim 3298, [2004] 2 Cr App R (S) a confiscation order originally made in the sum of £40,586 was reduced by £1 after the defendant had £36,850 seized from him on arrest, which was subsequently returned to him. He then gave £36,000 to his three sons. The DTA requires a reduction to be made in the order, but the Court of Appeal felt the facts of the case only justified a nominal reduction.
[1161] POCA 2002, s 23(1) as amended by SCA 2015, s 8.
[1162] Fisher (n 60) 760.
[1163] NAO Progress Report (n 367) 27.
[1164] Gardner (n 1101).
[1165] ibid 95-96.

(b) the defendant, **prosecutor, designated officer of the enforcement authority,** or a receiver appointed under section 50 or 52, applies to the Crown Court to vary the order under this section.[1166]

He explained that this was necessary as either defendants do not understand the complicated nature of the legislation which means that they either think that if the asset identified at the Crown Court has been sold, even for a lesser amount, then that will satisfy the order; or the application process is too complicated. He argued that it would be wrong for a defendant or the taxpayer, if the defendant is legally aided, to pay for a variation, especially if any shortfall is not his fault, and that getting a defendant to apply for a variation can take more resources than making the application.[1167]

It is suggested that Gardner's recommendations are particularly relevant to the recommendation in this thesis for the Crown Court to be able to make a charging order. In chapter 4 of this thesis on restraint, concerns by researchers were identified about the effect a fall in property prices could have on the amount that could be obtained from a share in a property.[1168] If a power by the designated officer to apply for a variation or certificate of inadequacy was introduced, it would be relevant here if the house is sold for less than the valuation set at the confiscation hearing.

In *Re Callinan*[1169] a confiscation order had been made under the DTA 1994 on the basis of the defendant's share in various properties. When the properties were subsequently sold in negative equity or had been repossessed, the High Court held that the defendant's realisable property was inadequate to satisfy the confiscation order, although the decision whether or not to reduce the order was one for the Crown Court under the legislation. Although this case concerned property in Spain, it is suggested that it supports the

[1166] ibid 96. Gardner's suggested amendments are in bold.
[1167] ibid 94-96.
[1168] Text to n 966-n 975 in chapter 4. If there is a downturn in the property market or a property is sold for less than its valuation as part of the confiscation order after a charging order is made then the defendant can apply for a downward variation of the confiscation order. These issues are not particular to charging orders, they would apply in all cases where the asset is a house.
[1169] [2018] EWHC 230 (Admin).

premise that the defendant can subsequently apply to vary an order if a house is sold for less than its valuation for the purposes of the confiscation order.

The experience of the research author is that the issues identified by Gardiner still exist and it is recommended that the designated officer should be given the power in section 23 POCA 2002 to apply to the Crown Court for a confiscation order to be varied. These could mirror the power to apply for the discharge of a confiscation order under both POCA 2002 and the pre-POCA 2002 legislation.[1170] Then as soon as an item is sold the case could be referred to the Crown Court. The prosecution and the defendant would be put on notice, but if the variation is agreed it could mirror the process for an application to discharge an order and be decided without a hearing.[1171] This would be of practical benefit and would allow the designated officer to apply for a variation without the sometimes lengthy delays and costs currently incurred. Defendants are often unaware that, despite an item being sold, the confiscation order has not been satisfied, or have to incur the expense of a defence solicitor being appointed. It would also support the recommendation for legislative amendments to allow the Crown Court to make a confiscation charging order.

5.7 Default Terms

In some ways the history of the default term provisions that apply to the enforcement of confiscation orders have had a similar history to the interest provisions. In the same way that interest did not accrue when the DTOA 1986 was introduced, neither did the default term wipe out the debt. Like the interest provisions, the default term is seen as one of the main sanctions for non-payment of a confiscation order[1172] and its effectiveness has also been called into question.[1173] The Law Commission has identified that in 2012 only 2% of

[1170] POCA 2002, s 25A and SCA 2015, s8.
[1171] CrimPR 33.18(4).
[1172] For example, Brown and others (n 173) 13; NAO Report (n 71) 41; Wood, Enforcing Criminal Confiscation Orders (n 2) 8-9; Wood, The Big Payback (n 5) 6.
[1173] For example Levi and Osofsky concluded that the extent to which defendants would serve the default term in lieu of payment may have been underestimated by those drafting the early

orders were paid in full after the activation of default,[1174] but there is no research into why this is the case.[1175] Again, as with interest, that debate is not considered, instead the issues for the magistrates' court dealing with the default term are reviewed. In practice the interpretation of the rules for activating the default term are not straightforward for the magistrates' court and some consideration of the development of the provisions is necessary to explain why.

A confiscation order is a financial penalty and is dealt with as a fine.[1176] As such it is governed by the provisions which apply to all fines, so until an exemption was introduced in the confiscation legislation, the serving of the default term for non-payment of a confiscation order wiped out the debt in the same way as wiping out a fine. This appears to have been a deliberate step, as in a House of Lords debate it was envisaged that although in some cases a defendant would choose to serve the period in default instead of paying as ordered, the government hoped that "not too many" would choose that option

legislation, although at that stage serving the default term wiped out the debt, Levi and Osofsky (n 162) viii. The PIU reported that default sentences were not always effective as defendants are sometimes content to serve the additional time and recommended that these powers should be used more effectively and that confiscation orders should be pursued even after the default term has been served, PIU Report (n 117) 72. In 2012 the default sentence was seen by some contributors to be an effective tool to make defendants pay, Brown and others (n 173) 13, although the interviews conducted by the NAO in their 2013 report found 'unanimous agreement' that the default sentence and the accrual of interest were ineffective sanctions, NAO Report (n 71) 41. Wood reported that the changes to default sentences in the SCA 2015 where to encourage payment. Wood doubted this quoting previous research that questioned the effectiveness of the sanction as an incentive to pay but acknowledged that it is too soon to assess the effectiveness of the changes, Wood, The Big Payback (n 5) 8-9. The NAO also determined that it was too soon to evaluate the success of the changes, NAO Progress Report (n 367) 11. The HAC heard evidence which called into question the effectiveness of the sanction, HAC 2016 Report (n 26) 28-29.

[1174] Law Commission (n 69) 23-24.

[1175] Levi 'Reflections on Proceeds of Crime' (n 38) 21.

[1176] DTOA 1986 s 6(1); CJA 1988 s 75(1); DTA 1994, s 9(1); POCA 2002, s 35(2). All financial penalties are sent to the magistrates' court to be enforced as if it had been ordered to be paid 'on a conviction by a magistrates' court', PCC(S)A 2000, ss 139-140. Even if it were not treated as a fine, a confiscation order is still a financial penalty imposed by the Crown Court and as such it is submitted that it would have been included in the list of ancillary orders in the Administration of Justice Act 1970, sch 9, part 1 to be enforced alongside any other financial penalty imposed as part of the same sentencing process.

and the government view was that once the default term had been served the order must end.[1177]

When they were writing, Levi and Osofsky doubted that there would be a change in the legislation so that serving a default sentence would not expunge the debt. They commented that if it did, a failure to collect may become a greater administrative problem in the future.[1178] Their views were prophetic as, coupled with the interest that accrues on non-payment, amounts outstanding have increased substantially despite an increase in amounts recovered.[1179] This supports the need for more effective civil enforcement powers to enforce confiscation orders after the default term has been served.[1180]

The Working Group First Report recommended that the setting of the default term should not expunge the defendant's liability to pay to ensure that defendants who did not comply would not only face a further period of imprisonment but also know that their property would be 'perpetually vulnerable' to confiscation.[1181] By the time of the Working Group Third Report the amount of money collected had increased and it was felt that the fact that the activation of the default term did not expunge the debt was a relevant factor but that it was too soon to say.[1182]

The First Report also recommended that the existing link between the default periods for fines and confiscation order defaulters should be broken because it was felt that the criminal backgrounds and economic circumstances of confiscation and fine defaulters were likely to be very different and the considerations which might indicate an increased period of imprisonment for the one, may well not apply to the other. The Group suggested

[1177] HL Deb 24 March 1986, vol 472, col 1200, Lord Glenarthur, then Under-Secretary of State for Home Affairs.
[1178] Levi and Osofsky (n 162) 51.
[1179] The interest figures are shown in Appendix 1, table B, Confiscation Order Debt 2017-2018.
[1180] The Supreme Court heard that the civil enforcement powers of a magistrates' court, namely the fines based powers short of committal, are unlikely to be effective to enforce interest, *Gibson* (n 12) [19]. Brown also found that the magistrates' court's powers were limited post default, Brown and others (n 173) 13.
[1181] Working Group First Report (n 137) 10.
[1182] Working Group Third Report (n 126) para 2.9.

that the default sentence applicable to confiscation orders should remain as they were, but the court should be able to make the periods more severe if needed in the future.[1183] However, it took until the changes in the SCA 2015 for the link to be broken.

The default term will always be served consecutively to a prison sentence for the offence[1184] and case law confirms that the purpose of the default sentence for not paying a confiscation order is to encourage compliance, and not further punishment.[1185] Until the case of *RCPO v Taylor*[1186] it was unclear what the position was if the defendant was serving a custodial sentence at the time of enforcement but not for the offence for which the confiscation order was made. This point was clarified when it was held that the magistrates' court has the power to postpone the issue of a warrant of commitment in respect of a confiscation order made by the Crown Court until after the expiry of a term of imprisonment imposed for an offence other than the offence for which the confiscation order was imposed. The term running consecutively 'avoids the default term in respect of the confiscation order being rendered futile by being served out concurrently with the sentence for the index offence.'[1187] This postponement is pursuant to s 77(2) of the MCA 1980 and permits the magistrates' court to deal with the default term in the same manner whether the period being served by the defendant is for the predicate offence or not, and if the judgment had decided otherwise, it would have meant in practice that activating the default term would have no consequence for the defendant.

The PAC concluded that the sanction did not work, and since the Home Office gave evidence that it would strengthen the default sentence, the PAC recommended that the Home Office and MOJ must identify how the sanction would be strengthened as it concluded that many defendants would rather serve prison sentences than pay the confiscation order. The PAC also suggested that the Joint Committee on the draft Modern

[1183] Working Group First Report (n 137) 10.
[1184] POCA 2002, s 38. In the previous legislation the provisions are contained in DTOA 1986, s6; CJA 1988, s75; DTA 1994, s9.
[1185] *O'Connell* (n 79) [36].
[1186] [2010] EWHC 715 (Admin).
[1187] ibid [16] (Blair J).

Slavery Bill might deliberate on this.[1188] Changes to the default sentences for confiscation orders made under POCA 2002 were introduced in the SCA 2015 which split the maximum terms in default for non-payment of confiscation orders from the periods for non-payment of fines. For confiscation orders governed by the new default terms there are four bands, ranging from a maximum of 6 months imprisonment in default of paying a confiscation order of up to £10,000 up to a maximum of 14 years for a confiscation order of over £1 million.[1189] For fines, and confiscation orders governed by the old rules, there are 12 bands ranging from a maximum of 7 days in default of paying an order of £200 up to a maximum of 10 years for an order for over £1 million.[1190]

The changes to the default sentences were also introduced because of a commitment in the 2013 Serious and Organised Crime Strategy to 'substantially strengthen the prison sentences for failing to pay confiscation orders so as to prevent offenders choosing to serve prison sentences rather than pay confiscation orders'.[1191] Sahota and Yeo note that the default terms now included in POCA 2002 as a result of the SCA 2015 have been 'substantially increased' but comment that it remains to be seen if the amendments will have the desired effect.[1192] However, the authors do not make mention of one of the amendments which may have the biggest impact on a defendant. In line with other custodial sentences, the defendant will normally serve half of the default term activated by the magistrates' court. Confiscation orders made for more than £10 million under POCA 2002 on or after 1 June 2015 will not be eligible for that reduction and the defendant is liable to serve the full term of the order which is up to fourteen years. This change has been described as 'dramatic'[1193] but as Sahota and Yeo suggest it is still too soon to

[1188] PAC Report (n 328) 5, 12.
[1189] POCA 2002, 35(2A).
[1190] PCC(S)A 2000, s 139(4). This applies to confiscation orders by virtue of POCA 2002, s 35(2). In the pre-POCA 2002 legislation the provisions are DTOA 1986 s 6 (1); CJA 1988 s 75 (1); DTA 1994, s 9(1). PCC(S)A 2000 replaced the PCCA 1973, s 31(3A). When the PCCA 1973 was first introduced, the maximum default term in PCCA 1973, s31 for non-payment of a fine was 12 months. As a result the DTOA 1986, s 6 introduced a new table for default terms for confiscation orders. The new PCCA 1973 s 31(3A) for fines was introduced by CJA 1988, s 60.
[1191] 2013 Serious and Organised Crime Strategy (n 62) 35.
[1192] Sahota and Yeo (n 909).
[1193] Hopmeier and Mills (n 675) 460.

assess the effectiveness of the changes to the default term. The changes to POCA 2002 brought about by the SCA 2015 came into force for confiscation orders made on or after 1 June 2015. Practically this means that as the default term will be anything up to 14 years and will be ordered consecutively to a sentence for the predicate offence, it will be some time before meaningful research can be conducted.[1194]

5.8 Conclusions of chapter

The confiscation legislation has introduced powers which impact on the ability of the magistrates' court to enforce an order. The changes in the legislation and the different powers in relation to time for payment, interest, bank accounts, variations and discharge, and the default terms have added further complexity to an already complicated system.

Changes to shorten the time for payment are welcome, and meet the issues raised since the Working Group Third Report. However, HMCTS now has to manage different periods within the same order. As a result, interest accrues at different stages and the case of *Gibson* means that the methods of enforcing unpaid interest are limited. If the prosecutor cannot or does not apply to increase the default term to take account of the unpaid interest, then the magistrates' court can only enforce the interest by non-custodial methods. It is therefore vital that effective options are available.

It is suggested that the enforcement of interest post *Gibson* is an area suitable for further research and possible legislative amendment to allow for the enforcement of interest by the use of the default term. This case also highlights the complexities of using the fines based legislation for the enforcement of confiscation orders and this too is an area for future research.

[1194] The changes to POCA 2002 brought about by the SCA 2015 came into force in June 2015 for confiscation orders made on or after 1 June 2015, The Serious Crime Act 2015 (Commencement No 1) Regulations 2015, SI 2015/820. Either way the maximum of 14 years will be imposed in default of paying the confiscation order. If a custodial sentence has been imposed for the offence which resulted in the confiscation order, it will be served before the default term.

The case of *Gibson* also adds weight to the argument that more effective powers should be available to the Crown Court including the introduction of confiscation charging orders and payment orders to make the magistrates' court collection and enforcement powers more effective. This would assist either by ensuring that assets are realised promptly to prevent interest accruing, or if interest does accrue in ensuring there are more effective powers available.

It is recommended that the time for payment should be linked to the asset, for example a longer period should be given if a property has to be sold, but also that time for payment should also be linked to orders made at the Crown Court directly relevant to the assets identified. For example, time for payment in relation to a house would be linked to a confiscation charging order and cash in a bank account would be linked to a payment order. This is because the changes to the time for payment provisions are not enough in themselves to ensure that confiscation orders are paid promptly. The last chapter established that restraint (and charging orders in the pre-POCA 2002 legislation) are often enough to ensure that the order is satisfied. However, issues with the orders mean that they are not always used.

Previous research has shown that bank accounts are an asset which can be dissipated quickly and suitable for restraint. Third party debt orders are a difficult and costly method of enforcing an order where the asset is a bank account and so payment orders were introduced in POCA 2002. Yet without a restraint order the money in a bank account can be dissipated before an application can be made. The removal of the criteria that a confiscation order must also have a restraint order before a payment order means that dissipation can occur, and this appears to be an unintended consequence.

It is therefore recommended that the changes suggested by the Working Group Third Report are re-visited and that changes to the payment order provisions are introduced. The payment order provisions met a need to remove the complexities for the designated officer for the magistrates' court when applying to the county court for a third party debt

order when the defendant has money in a bank account, but only apply to confiscation orders made under POCA 2002.

The recommendations are that the payment order provisions should be extended to the pre-POCA 2002 legislation in the same way that the powers of discharge have been extended. Secondly, the Crown Court should be able to make an order on imposition to ensure there is no dissipation of money in a bank account before the case is sent to the magistrates' court for an application to be made as in the current system. Finally, that the Crown Court and the magistrates' court could also have the power to make a payment order subsequent to the confiscation order being made. The Crown Court power could be an interim payment order with notice to the bank, which if nothing is heard, becomes absolute on a given date. If an objection is received a hearing could be arranged in the magistrates' court and until then the interim payment order would remain in place.

Introducing payment orders as a Crown Court power would prevent the dissipation of cash in a bank account, it would also achieve other purposes in the regime, namely achieving disruption and improving collection whilst retaining the nature of confiscation as an order against the person. It would also be in line with the purpose of a one stop shop for confiscation in the Crown Court.

The introduction and then extension of the powers to discharge a confiscation order is a welcome addition to the powers of the magistrates' court where there are small amounts outstanding. There have been calls for further research into the powers to 'write off' confiscation orders[1195] which is an area suitable for further analysis.

This chapter also analysed the issues and complexities the magistrates' court experiences with its specific powers of enforcement in the confiscation legislation, ending with the analysis of the default term provisions as they apply specifically to confiscation orders. Activating the default term is not a punishment and there are specific issues for the

[1195] Text to n 1153-n 1154.

magistrates' court when dealing with the rules for activating the default term. These are analysed in the next chapter.

Chapter 6 Enforcement: Fines based powers of the magistrates' court

6.1 Introduction

There are two strands of enforcement relevant to this thesis. One is the power of restraint (and the power in the pre-POCA 2002 legislation for the Crown Court to make a charging order) to preserve property to ensure that it is available to satisfy the confiscation order, using a receiver where necessary; and the other is the power of the magistrates' court to enforce.

This chapter continues to answer the research questions by explaining further how the legislation has developed. A review of the history of the enforcement of confiscation orders in the magistrates' court shows that the way the confiscation legislation has developed means that the fines based powers are the main powers available. There have been relatively few changes specifically for confiscation to supplement those powers.

At the heart of the thesis are the recommendations in relation to payment orders made in the last chapter, and for the introduction of the power for the Crown Court to be able to make a confiscation charging order which is analysed in the next chapter. These would simplify the processes for the magistrates' court where the asset identified is a house or a bank account and would counter the difficulties inherent elsewhere in the system.

Previous chapters have already identified some of the complexities for the magistrates' court enforcing confiscation orders and this chapter shows the complex nature of the use of fines based powers for the enforcement of confiscation orders. It is argued that this should be addressed by the Crown Court making orders which will assist with enforcement in the magistrates' court. It is also recommended that further research is needed to consider simplifying the rules which apply in the magistrates' court.

The last chapter explained how there are different factors for the magistrates' court to be aware of when enforcing a confiscation order, as issues such as time for payment and interest will vary depending on when the offence was committed and the relevant version

of the Act in force at the time. Whether the default term is activated or not, interest accrues and the sum (including interest) must be enforced if not paid in full.

This chapter considers how the fines based enforcement provisions of the magistrates' court apply, with modification, to the activation of the default term, and the other powers available to the magistrates' court. The activation of the default term is not a punishment, it is there to encourage compliance.[1196] The case law on fines makes it clear that there must be an effective method of enforcement[1197] and as a confiscation order is enforced as a fine, there is a similar need for effective enforcement. However, regardless of the obligation on the courts, the onus is on the defendant to satisfy the order.[1198]

There are difficulties for the magistrates' court enforcing a confiscation order after the default term has been served as there are fewer options available, as Brown et al found when conducting their research.[1199] The activation of the default term is not automatic; a magistrates' court must consider whether there are any methods short of issuing the warrant of commitment, known as the civil means of enforcement, and the next chapter will analyse the appropriateness of the alternatives to committal.

Although it has been claimed that the biggest changes to the confiscation regime in 2015 were in relation to enforcement,[1200] this chapter will show that there has been little substantial change to the fines based powers of magistrates' court to collect and enforce confiscation orders. There have been criticisms of the limited powers of the magistrates' court since the Working Group First Report[1201] and although HMCTS performs relatively well[1202] there are still difficulties for magistrates' courts when enforcing confiscation orders.

[1196] *O'Connell* (n 79) [36].
[1197] *MacRae* (n 529).
[1198] *R v Chichester Justices ex parte Crowther* (Div, 14 October 1998); *R (on the application of Popoola) v Westminster Magistrates' Court* [2015] EWHC 3476 (Admin); *R (on the application of Johnson) v Birmingham Magistrates' Court* [2012] EWHC 596 (Admin); (2012) 176 JP 298; *R (Natural England) v Day* [2014] EWCA Crim 2683, [2015] 1 Cr App R (S) 53; *R (on the application of Marsden and McIntosh) v Leicester Magistrates' Court* [2013] EWHC 919 (Admin).
[1199] Brown and others (n 173) 13.
[1200] Gentle, Spinks and Harris (n 491) 6.
[1201] Working Group First Report (n 137).
[1202] text to n 336, n 351 and n 355 in chapter 2.

Mitchell et al identified issues with the delay between making the confiscation order and the payment, and a duplication in work in relation to the powers of the magistrates' court to enforce, as the defendant's assets have been assessed when the order is made.[1203] HMCTS operate at the end of the process, and if assets have not been identified or restrained it is difficult to enforce.[1204]

All of these issues are within the practical knowledge of the research author who is also aware of the limited options available where the asset involved is a house or bank account, and a need to enforce against these assets exists. As noted the payment order provisions in POCA 2002 do not apply where the confiscation order is made under the pre-POCA 2002 legislation, and so the only option is for the designated officer to apply for a third party debt order where there is cash in a bank account. Similarly, the next chapter will show that if the asset identified is a house the only option is to apply for a charging order. A recommendation is made that the power to make a confiscation charging order should be introduced to the Crown Court, by introducing an amendment to POCA 2002.

If cash in a bank account or house has been identified at the Crown Court, then it will have all the information to make an order to preserve the asset yet the legislation requires the Crown Court to go so far in the process and then send the confiscation order over to the magistrates' court to enforce. This places the magistrates' court at an unfair disadvantage, and HMCTS in a different position to the other agencies, especially as time for payment must expire before enforcement actions (other than making a payment order) can be taken.

When confiscation orders were introduced, an article written by experts in the Home Office explained the aim of the enforcement provisions. They explained that 'the burden' of enforcing orders was given to magistrates' courts using their fines based powers, and to the High Court in larger and more complex cases, using restraint, charging and

[1203] *Mitchell Taylor and Talbot* vol 1, para 8.001 (R0: February 2002).
[1204] Evidence of Peter Handcock PAC Report (n 328) Ev 14.

receivership orders.[1205] The practical situation is that restraint orders are not applied for in all cases where they may be suitable because of the issues involved.[1206] This means that the magistrates' court has to use its fines based powers in cases for which they were not designed, nor intended to be used. This is particularly so where the asset is a house or cash in a bank account.

The idea of enforcing a confiscation order can be thought of as a misnomer,[1207] as the assets should have been identified at the Crown Court. Even though the regime has been described as draconian,[1208] there are balances in the system. It is clear that the purpose of the enforcement process is to obtain the money not to punish the defendant a second time.[1209] In addition A1P1 of the ECHR applies to the enforcement of orders and the means used by the magistrates' court to enforce the order and deprive the defendant of his property must be proportionate, balancing the legitimate aim of enforcing the order against the rights of the defendant.[1210] The principles in article 6(1) and (3) also apply and enforcement proceedings must be conducted within a reasonable time[1211] and must take into account the defendant's rights to have legal representation.[1212]

6.2 The fines based powers of the magistrates' court to enforce a confiscation order

Despite the fact that the confiscation order is made under the confiscation legislation, the majority of the powers that the magistrates' court has to enforce are contained in the MCA 1980, and were not designed for the enforcement of confiscation orders but for the

[1205] 'The UK Drug Trafficking Offences Act 1986' (n 17) 1632.
[1206] Neither are charging orders under the pre-POCA 2002 legislation.
[1207] Brunning, 'The Enforcement of Confiscation Orders in the Magistrates' Court' (n 474) 430.
[1208] Text to n 470-n 473 in chapter 3.
[1209] Text to n 530 in chapter 3.
[1210] *Ahmad and Ahmed* (n 12).
[1211] *Crowther v United Kingdom* (n 519).
[1212] *Agogo* (n 521).

enforcement of other financial penalties, including fines. This has given rise to difficulties in application and interpretation.[1213]

When the Crown Court makes a confiscation order, it will impose a period in default which is to be served if the defendant does not pay as ordered, but even if this is served it does not wipe out the debt. The Crown Court will also set time for payment, and if the order is not paid as ordered, interest accrues. The confiscation order is then enforced in the same way as a fine but with some differences.[1214]

The rules governing the powers of the magistrates' court to impose a default term for a fine are complicated in themselves and the provisions have been described as a 'labyrinth of statutory provisions' which are 'scattered across' different legislation.[1215] It is therefore not surprising that adding more provisions to that system in order to enforce confiscation orders has caused issues.

Confiscation orders have always been enforced as if they were fines.[1216] The DTOA 1986 introduced the power of the Crown Court to make a confiscation order and was therefore the first one to outline the powers of enforcement of the magistrates' court. Section 6 of the DTOA 1986 provided that a confiscation order made under the Act was treated as if it were a fine imposed by the Crown Court. It was also the first time that exclusions to Part 3 of the MCA 1980 were applied to the enforcement of confiscation orders in the magistrates' court.

Despite the changes in the confiscation regime through the CJA 1988, the DTA 1994 and POCA 2002, including the changes introduced in 2015, the powers of the magistrates' court to enforce a confiscation order have remained remarkably unchanged. A comparison of section 6(4) DTOA 1986, section 75(5) CJA 1988, section 9(4) DTA 1994

[1213] *Gibson* (n 12) [12].
[1214] DTOA 1986, s 6; CJA 1988, s 75; DTA 1994, s 9; POCA 2002, s 35. See also PCC (S)A 00, ss 139 and 140 (which replaced the PCCA 1973).
[1215] *R v St Helens Justices, ex parte Jones* [1999] 2 ALL ER 73 (QB), 163 JP 369.
[1216] DTOA 1986, s 6; CJA 1988, s 75; DTA 1994, s 9 and POCA 2002, s 35.

and s 35(3) POCA 2002 shows that the only difference in the application of Part 3 of the MCA 1980 which contains the magistrates' court powers of enforcement, is slight. Section 6(4) of the DTOA 1986 reads:

> In the application of Part III of the Magistrates' Courts Act 1980 to amounts payable under confiscation orders (a) such an amount is not a sum adjudged to be paid by a conviction for the purposes of section 81 (enforcement of fines imposed on young offenders) or a fine for the purposes of section 85 (remission of fines), and (b) in section 87 (enforcement by High Court or county court), subsection (3) shall be omitted.

The corresponding provisions in section 75(5) CJA 1988, and section 9(4) DTA 1994, remained unchanged. There was a slight amendment in section 35 of POCA 2002 so that s 35(3) reads:

> In the application of Part 3 of the Magistrates' Courts Act 1980 to amounts payable under confiscation orders (a) *ignore section 75 of that Act (power to dispense with immediate payment)*; (b) such an amount is not a sum adjudged to be paid by a conviction for the purposes of section 81 (enforcement of fines imposed on young offenders) or a fine for the purposes of section 85 (remission of fines), and (c) in section 87 (enforcement by High Court or county court), ignore subsection (3) (inquiry into means)[1217]

All the legislation excludes section 81 of the MCA 1980 from the powers of the magistrates' court, which contains the powers specifically relating to the enforcement of other financial penalties where the defendant is a youth, a group of defendants that fall outside the scope of this research. Also excluded in all the legislation is the power of the magistrates' court to remit a confiscation order.[1218] The exclusion of s 87(3) in all versions means that in practice there is no need for the magistrates' court to conduct a means

[1217] Emphasis added to highlight the difference.
[1218] Contained in s 85 MCA 1980.

inquiry before the designated officer applies for a payment order or charging order in the county court. This is directly relevant to this research as it cuts out a step before the application is made which is a benefit to the magistrates' court.[1219]

The additional provision in POCA 2002 is the instruction to ignore section 75 MCA 1980 which does not appear to have any real practical impact on the magistrates' court. The section allows the magistrates' court to give time for payment on imposition, or payment by instalments, which can then be extended. Even though this power is not available to the magistrates' court when enforcing a confiscation order made under POCA 2002, the court can still further postpone the period of default set by the Crown Court,[1220] and can adjourn the enforcement proceedings,[1221] although in both scenarios interest will continue to accrue. Case law has also established that section 75 MCA 1980 does not apply to confiscation orders made under the pre-POCA 2002 legislation in any event.[1222] It is therefore submitted that the fact that section 35 POCA 2002 requires the magistrates' court to ignore section 75 MCA 1980 is a technical amendment only, does not add to the powers of the magistrates' court, and that there has been little change to the fines based powers of the magistrates' court to enforce confiscation orders.

As explained in the case of *Ahmad and Ahmed,* there is no material difference in the enforcement provisions of POCA 2002 and the legislation pre-POCA 2002.[1223] As a result, the provisions of POCA 2002 will continue to be used to explain the law in this thesis unless there is a difference that requires explanation. [1224]

[1219] If section 87 (3) MCA 1980 applied then the magistrates' court would have to make a finding that the defendant has the means to pay forthwith. The Crown Court has already determined this when making a confiscation order.
[1220] MCA 1980, s 77(2).
[1221] For example, applications to adjourn a confiscation enforcement hearing to apply for a certificate of inadequacy or variation are common, Sutherland Williams, Hopmeier and Jones (n 58) 254; *Mitchell Taylor and Talbot* vol 1, para 8.004 (R5: September 2004).
[1222] *Greenacre* (n 1021).
[1223] *Ahmad and Ahmed* (n 12) [28].
[1224] Although the magistrates' court is still enforcing confiscation orders made under POCA 2002 and the pre-POCA 2002 legislation.

The powers of magistrates' court to enforce confiscation orders is based on the law for financial penalties with some limitations and also depend on the legislation under which the confiscation order was made. This dictates whether interest accrues once time for payment has expired, and whether imprisonment in default expunges the debt. This means the enforcement of confiscation orders can be complicated and has led to difficulties for the judiciary trying to follow the rules that apply to the magistrates' court in any given case. In *North Kent Magistrates' Court v Reid*[1225] the judge hearing a case relating to a confiscation order made under the DTOA 1986 described the statutory provisions in different Acts as a 'labyrinth' commenting that even with the help of counsel he was not sure that he had a complete clear grasp of the precise statutory thread.[1226] In *Anscombe* the confiscation order was made under the CJA 1988 and the judge commented that:

> Solving the problems before the Court requires a formidable trail through the Powers of Criminal Courts Act 1973, the Magistrates' Courts Act 1980 and the Criminal Justice Act 1988 each of which has been amended at various different times.[1227]

In *Gibson* the Supreme Court considered the way the confiscation legislation and the fines based powers of the magistrates' court interact which it described as a 'process of successive referrals.'[1228] Although the case concerned a confiscation order made under the DTA 1994, the case is not just of historical interest as the issues arise in a similar way in POCA 2002.[1229] The referrals for fine enforcement described in *Gibson* start with the provision which permits the Crown Court to impose a period in default if a fine is not paid as ordered. There are maximum periods of imprisonment which can be imposed in

[1225] *North Kent Magistrates' Court v Reid* (n 19).
[1226] The judge also commented that even with the help of counsel he was not sure that he had a complete clear grasp of the precise statutory thread, ibid (Park J).
[1227] *Anscombe* (n 20) (Schiemann LJ).
[1228] *Gibson* (n 12) [11].
[1229] ibid [2].

default[1230] and the conditions which must apply before the Crown Court can impose a period in default are that:

- The offence is punishable with imprisonment and the defendant appears to the magistrates' court to have the means to pay forthwith, or
- It appears to the court that the defendant is unlikely to remain at a place of abode in the UK to allow enforcement by any other means, or
- The defendant is sent to prison or detention for the offence, or they are already serving a term of imprisonment or detention.[1231]

All fines imposed by the Crown Court are, 'treated for the purposes of collection, enforcement and remission… as having been imposed … on a conviction by a magistrates' court.'[1232] The fine is passed to the magistrates' court for enforcement, and for the purposes of this thesis, the main powers of enforcement are contained in Part 3 of the MCA 1980. The Crown Court retains some control so if a magistrates' court wants to remit a fine it would need to seek the permission of the Crown Court first.[1233] Interest does not accrue on an unpaid fine.[1234]

For the enforcement of confiscation orders, the same basic provisions apply because of section 35(2) POCA 2002 although as noted there are exceptions, the magistrates' court cannot remit a confiscation order, and a means inquiry is not required before an application is made for enforcement in the High Court or county court.[1235]

There is now a further difference to take into account for confiscation orders made under POCA 2002 since 1 June 2015. Prior to this date the periods in default imposed at the

[1230] PCC(S)A 2000, ss 139(2)-(4).
[1231] PCC(S)A 2000, s 139(3). These grounds are similar to those which must exist before the magistrates' court can impose a default term on imposition in MCA 1980, s 82(1).
[1232] PCC(S)A 2000, s 140(1).
[1233] PCC(S)A 2000, s 140(5).
[1234] An unpaid unlawful profit order will accrue interest at the same rate as a confiscation order, but these are enforced as a compensation order not a fine, the Prevention of Social Housing Fraud Act 2013, s 4(10), (12).
[1235] POCA 2002, s 35(3).

Crown Court mirrored the periods imposed for fines.[1236] Since the changes in SCA 2015, the periods have changed for confiscation orders made on or after 1 June 2015 and there are only four bands for periods in custody, instead of twelve. They range from a maximum of 6 months imprisonment in default of paying a confiscation order of up to £10,000 up to a maximum of 14 years for a confiscation order of over £1 million.[1237] The final difference between a fine and a confiscation order is that when a confiscation order is not paid within the time for payment set by the Crown Court interest accrues.[1238]

6.3 The powers available when time for payment has expired

The first thing the magistrates' court will do when it receives a confiscation order from the Crown Court is try to get the defendant to pay voluntarily. If enforcement is necessary it is undertaken by the magistrates' court, but this is not limited to the actual courtroom, payments are due to the designated officer for the magistrates' court[1239] who, for example, makes applications for enforcement in the High Court or county court,[1240] or applies to the Crown Court for the discharge of a confiscation order.[1241]

6.3.1 Collection orders

The powers of fine enforcement have been extended because of the introduction of the Courts Act 2003. The Act introduced collection orders which if made creates the role of a fines officer who is authorised to take enforcement steps specified in the Act. Case law has now clarified that a collection order can be made in relation to a confiscation order, but they are rarely used in relation to such orders[1242] and it is the experience of the

[1236] When the DTOA 1986 was introduced it had its own default table, DTOA 1986, s 6(1). The table was later replicated in PCCA, s 31(31A) which meant that the same default periods applied to confiscation orders and fines imposed at the Crown Court.
[1237] POCA 2002, 35(2A).
[1238] POCA 2002, s 11.
[1239] POCA 2002, s 55.
[1240] MCA 1980, s 87 and *Designated Officer for Sunderland Magistrates' Court v Krager and another* [2011] EWHC 3283 (Ch), [2012] 1 WLR 1291.
[1241] POCA 2002, ss 24-25A.
[1242] *R (on the application of Lawson) v Westminster Magistrates' Court* [2013] EWHC 2434 (Admin), [2014] 1 WLR 2085.

research author that they are usually only used after the default term has been served and there are no other options available. The main powers of a fines officer are contained in Schedule 5, and the Act allows a fines officer to take these steps without a further court hearing if the defendant is in default and a notice has been served on the defendant giving the defendant the opportunity to appeal to the magistrates' court.[1243]

The process has inbuilt oversight by the magistrates' court over the actions of the fines officer. Some of the powers replicate those taken in the magistrates' courtroom, namely the power to make an attachment of earnings order, an application for a deduction from benefits order, issue a warrant of control or take enforcement in the High Court or county court. However, some new powers of enforcement were introduced by the Act. Those applicable to confiscation orders are fine registration and the making of a clamping order.[1244] These new powers are available in the courtroom only if there is a collection order and the case has been referred back to the court for enforcement by the fines officer.[1245]

If a clamping order[1246] is made it means a vehicle can be clamped. Like most of the enforcement actions available for non-payment of a confiscation order, it is only available if the defendant is in default and there are conditions which apply before an order can be made, including a finding that the defendant has the means to pay, which will already have been established by the Crown Court. There are also exceptions to the type of vehicle that can be clamped. For example, a vehicle that is not in the defendant's name cannot be clamped. Once a vehicle has been clamped, the defendant can obtain its release by paying the sum due and any fees and charges; but the magistrates' court can also order the sale of the vehicle to pay the amount outstanding.

[1243] Courts Act 2003, sch 5 para 37.
[1244] Courts Act 2003, sch 5 para 38.
[1245] Courts Act 2003, sch 5 paras 37, 42.
[1246] Courts Act 2003, sch 5.

The nature of the order is very similar to a warrant of control, in that a vehicle is seized and can be sold, although for clamping there must be a subsequent order by the magistrates' court permitting the sale.[1247] Like a warrant of control, time for payment must have expired before a clamping order can be made and therefore, if the vehicle was identified as an available asset, it could be dissipated by the expiry of the time for payment period. If a vehicle is identified as an asset there may be a place for clamping orders in the enforcement of confiscation orders, but it should be noted that a warrant of control is sufficient to seize and sell a vehicle without a further court order. Clamping orders are not used in practice for the enforcement of confiscation orders, and given the hurdles that need to be gone through before a vehicle can be clamped, and the fact that there is a direct alternative in the form of a warrant of control, this is not surprising.

The power to register the debt on the Register of Judgments, Orders and Fines is also available to the fines officer or the magistrates' court in the same circumstances as a clamping order[1248] and like clamping orders are not used in practice. The impact on the defendant of having a debt on the register is that searches can be made of it which would show the defendant has an outstanding debt to the magistrates' court, which could impact on their ability to apply for credit. The defendant must be in default before the registration can take place, and if the confiscation order is registered then the defendant has one calendar month to pay in full to get the amount removed. After a calendar month, if the confiscation order is paid in full, the register will show that the amount is satisfied but it remains on the register. The confiscation order can only be registered within five years from the date of conviction for the offence and must be removed five years from the date of conviction, so its application is limited for confiscation orders. A confiscation order can be made up to two years after the conviction date, so in many cases, the debt could only remain on the register for a maximum of three years, and for older orders made where the conviction is more than five years old, the power to register is not available.

[1247] The Fines Collection Regulations 2006, SI 2006/501, reg 26.
[1248] Courts Act 2003, sch 5 Part 9.

Wood recommended that the Criminal Finances Board should consider a central public register of unpaid confiscation orders which can be accessed and searched by private-sector institutions.[1249] She felt that this was important so that private sector institutions including banks could monitor the progress of the case, which can take years; and that it would be particularly useful if there is a restraint order. She used as a comparator the use of the public register of County Court Judgments established by The Register of Judgments, Orders and Fines Regulations 2005.[1250] Evidence was given to the PAC Progress Review that a county court judgment affects a person's credit reference, but that a confiscation order does not.[1251] The existence of a collection order gives the magistrates' court or fines officer the power to register the debt and so, in theory, the Register is available to a confiscation order if a collection order is in force.[1252] However, to be used in practice it is suggested that the Regulations would need amendment to make them more applicable to confiscation orders and the five year limit should be reviewed. Confiscation orders often take a long time to be satisfied[1253] and it is unlikely that a five year limit would be effective.

The use of a collection order also addresses an issue raised by Brown et al in 2012. At that stage they reported the fact that a magistrates' court could not issue a warrant of arrest if the defendant failed to attend court after the default sentence has been served.[1254] Whilst that is still the case in the majority of cases,[1255] a warrant of arrest can be issued after a default sentence has been served if a collection order has been made and the fines officer has issued a summons.[1256]

[1249] Wood, The Big Payback (n 5) 21.
[1250] The Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595.
[1251] PAC Progress Report (n 348) Ev 36.
[1252] The Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 8.
[1253] It can take years for an order to be satisfied, text to n 1031-n 1033.
[1254] Brown and others (n 173) 13.
[1255] *R (on the application of Necip) v City of London Magistrates' Court & RCPO* [2009] EWHC 755 (Admin), [2010] 1 WLR 1827.
[1256] MCA 1980, s 83(2) and *Lawson* (n 1242).

In practice collection orders are not widely used for the enforcement of confiscation orders. This is due to the fact that the powers of the fines officer are similar to that of the court, and in order for a fines officer to take a step there is a need for a further notice to be served on the defendant with an in built delay. There may be a function for collection orders and the added sanctions they bring in the enforcement of confiscation orders. A detailed analysis falls outside the focus of this thesis, but it is recommended as an area suitable for further research which should include a review of The Register of Judgments, Orders and Fines Regulations 2005.

6.4 The enforcement hearing

If the powers of the designated officer and fines officer are not sufficient, then an enforcement hearing will be listed once time for payment has expired, all enforcement actions have been exhausted and there is still an amount outstanding on the confiscation order.

The magistrates' court may be faced with an application for a payment order[1257] or an application for the sale of goods.[1258] The designated officer for the magistrates' court may also make an application to the Crown Court for the discharge of a confiscation order if the limited grounds apply[1259] or an application for enforcement in the High Court or county court without a further hearing in the magistrates' court.[1260]

If there is a restraint order and no receiver, the magistrates' court can still enforce the confiscation order, including activating the default term but must give notice to the prosecutor. If there is a receiver, the court can still enforce and there is an onus on the defendant to pay the order, not to wait for others to enforce[1261] because there may be good reasons why enforcement by a receiver would not be appropriate, for example the

[1257] POCA 2002, s 67.
[1258] POCA 2002, s 67A.
[1259] POCA 2002, ss 24-25A.
[1260] POCA 2002, s 35(3), MCA 1980, s87.
[1261] *Popoola* (n 1198).

costs involved. However, if the court is informed that the prosecutor recommends the appointment of a receiver, an adjournment should be considered.[1262] It is not necessary for the court to try other means of enforcement before activating the default term, but only to consider them.[1263] It is suggested that these principles would apply if there is a charging order in force, and that the designated officer for the magistrates' court would not have to enforce a charging order by way of an order for sale before the court could activate the default term. The decision of the magistrates' court would depend on the facts of each case.

6.5 The role of the prosecution

The magistrates' court is responsible for the enforcement of confiscation orders, although in some cases the prosecution is the lead agency. The CPS will be the lead agency if it can add to the enforcement process and the arrangements are covered in a service level agreement with HMCTS.[1264] In practice if there is a restraint order, the prosecution will be the lead agency; and if a receiver is appointed then the prosecution will act to satisfy the order, if not the powers of the magistrates' court will apply. That still leaves a large number of accounts where either HMCTS is the lead agency,[1265] or the lead agency, whether HMCTS or not, has not been able to realise assets and an enforcement hearing is necessary.

Even if the prosecution is not the lead agency, the prosecutor and financial investigators will have a part to play in the enforcement process[1266] liaising with the confiscation units and having the right to attend the enforcement hearing. If they do not attend, they can inform the court in writing of the enforcement history of the case.

[1262] *R (on the application of Beach) v Folkstone Magistrates' Court* [2018] EWHC 2843 (Admin).
[1263] For example, *On the application of Johnson* (n 1198) [38]-[39].
[1264] CPS Asset Recovery Strategy (n 321) 6.
[1265] Figure 4.1 reproduced in Appendix 1.
[1266] Hinton (n 473) 260-261.

This is an example of the criminal justice agencies working together which is particular to the enforcement of confiscation order as opposed to other financial penalties. Issues with a lack of communication between many of the leading agencies were first raised in the HAC Seventh Report[1267] which became a theme over many years. In 2016 the HAC heard that there were still issues preventing agencies working together[1268] however, the review documents not only show the importance of working together, they also highlight the improvements which have been made in this regard.[1269] As the magistrates' court does not have access to the information that prosecutors and financial investigators have, their help is needed to identify assets that defendants have including bank accounts and houses.

6.6 Activating the default term

A focus of case law about the powers of the magistrates' court to enforce confiscation orders has been on the activation of the default sentence, and case law and commentators explain that when setting the default term to be served in default of paying a confiscation order, the Crown Court is not seeking to provide additional punishment but to secure compliance, as the purpose of the legislation is to recover the maximum sums towards paying the order.[1270] As recently as 2017, the case of *O'Connell* confirmed that a

[1267] HAC Seventh Report (n 129) xx.
[1268] HAC 2016 Report (n 26) 31-32.
[1269] Working together and good communication between agencies has been identified as essential and vital to successful enforcement, for example Levi and Osofsky (n 162) 58-59; Payback Time (n 173) 81. The PIU Report found that better joint working between criminal justice agencies have helped to improve collection rates, PIU Report (n 117) 7-8. The NAO Progress Report also reflected positively on the work of the ACE (Asset Confiscation Enforcement) teams which it reported began in November 2014. They were set up by the Home Office to provide financial investigator support to enforcement criminal justice agencies. By the time of the report they had cost £3 million and helped to collect £18 million, NAO Progress Report (n 367) 22-23. Wood welcomed the attempts to improve strategic co-ordination amongst the large number of bodies involved in the confiscation process and also commented favourably about the ACE Teams, Wood, The Big Payback (n 5) 14-15.
[1270] n 530.

warrant of commitment is not a punishment for non-payment or for not paying the confiscation order sooner, it is a means of enforcement.[1271]

Case law also shows that when time for payment expires for the payment of a confiscation order, the activation of the default sentence is not automatic. In fact, the court must be sure that there is no other alternative available and there are principles from the case law governing what the magistrates' court must take into account before activating the default term. In a commentary about *Harrow Justices,*[1272] it was said that the magistrates' court must not act too precipitately in activating the default term, and that the purpose of the default term is to divest the offender of his proceeds of the offence, not to activate it.[1273] At that stage the serving of the default term wiped out the debt, but the principles still apply and in practice the default term will only be activated if there is no alternative.

As there have been difficulties in interpreting the fines based legislation as it applies to confiscation orders, it is necessary to consider the fines based provisions first as the rules which apply to imposing and activating the default term for non-payment differ when applying them to the non-payment of confiscation orders. This shows the differences to be taken into account by the magistrates' court.

6.6.1 Enforcing a fine using the default term

For the enforcement of a financial penalty other than a confiscation order, the magistrates' court has the power to impose imprisonment or detention in default of paying, either on imposition or subsequently, if the sum is not paid as ordered.[1274] There are restrictions on the magistrates' court which differ depending on whether the period in default is imposed

[1271] *O'Connell* (n 79) [36].
[1272] *Harrow Justices* (n 524).
[1273] *R v Harrow JJ, ex p Desai* (1992) 56 J Crim L122 (note).
[1274] MCA 1980, ss 76, 82.

on imposition or subsequently.[1275] In either event, the period can be suspended on whatever terms the court deems fit.[1276]

If the magistrates' court wants to impose a period of default on the imposition of a financial penalty, then one of three grounds must exist:

- The offence is punishable with imprisonment and the defendant appears to the magistrates' court to have the means to pay forthwith, or
- It appears to the court that the defendant is unlikely to remain at a place of abode in the UK to allow enforcement by any other means, or
- The defendant is sent to prison or detention for the offence, or they are already serving a term of imprisonment or detention.[1277]

Any fine imposed by the Crown Court is treated as if it was made by a magistrates' court and it is the magistrates' court which enforces the order.[1278] The grounds for imposing a default term on imposition in the Crown Court are in effect the same as those in the magistrates' court.[1279]

If the magistrates' court (or a Crown Court) *has not* imposed a period of detention or imprisonment in default *on imposition*, then the magistrates' court cannot impose a period in default unless it complies with section 82(3) MCA 1980 namely that:

- the defendant is already serving a period of imprisonment or detention; or

[1275] MCA, s 82.
[1276] MCA, s 77.
[1277] MCA 1980, s 82(1). The third ground cannot apply to the victim surcharge or criminal courts charge, MCA 1980, s 82(1A).
[1278] PCC(S)A 2000, s 140(1).
[1279] PCC(S)A 2000, s 139(3). The only difference between the grounds in the Crown Court and the magistrates' court is in the type of imprisonment or detention that is available in the Crown Court. For example, the powers to impose a period of default are available in the Crown Court when the defendant is sentenced to custody for life, a sentence that is not available in the magistrates' court.

- the court has conducted a means inquiry in the defendant's presence on at least one occasion since their conviction.[1280]

The powers of the magistrates' court are then further restricted as there are then two further hurdles in section 82(4). If the court is conducting a means inquiry, then the court must be satisfied that:

- the offence is punishable with imprisonment and the defendant has the means to pay forthwith; or
- the defendant has not paid as ordered because of his wilful refusal and culpable neglect and the court has considered or tried all other methods of enforcing payment and it appears that they are inappropriate or unsuccessful.[1281]

Section 82(4A) of the Magistrates' Courts Act 1980 then lists the methods of enforcing payments that the court must consider, which are a warrant of control, an application to the High Court or County Court; an order that the defendant is supervised pending payment; an attachment of earnings order; and an attendance centre order.[1282]

In effect, section 82(3) MCA 1980 asks a question, which is, was a term of imprisonment in default of payment set on imposition? If the answer is yes, then the magistrates' court does not have to consider the factors in sections 82(3)–(4A). If the answer is no, then before issuing a warrant of commitment for non-payment those sub sections must be complied with. This is an essential step in the application of the rules but, as can be seen in the next section, the judiciary have not always considered it. It is submitted that if the question is not asked and answered correctly, then it is easy to fall into error.

[1280] MCA 1980, s 82(3); emphasis added.
[1281] MCA 1980, s 82(4).
[1282] MCA 1980, s 82(4A).

6.6.2 Enforcing a confiscation order using the default term

A confiscation order is made in the Crown Court, and is treated as a fine which means that in the case of an adult the Crown Court will impose the days in default which are to be served if the defendant does not pay as ordered.[1283] The confiscation order is then treated as if it were a fine imposed by the magistrates' court and that court had imposed the period of default on the day the confiscation order was imposed.[1284]

As a result, following the legislation through, there is no requirement for the magistrates' court to jump over all the hurdles in section 82(3) to (4A) of the MCA 1980 outlined above, and so it does not have to conduct a means inquiry and find wilful refusal or culpable neglect before activating the default term for non-payment of a confiscation order. The means (realisable assets) have been established by the Crown Court in the confiscation hearing.[1285] However, the magistrates' court does have to be satisfied that there is no other means of enforcing the order short of committal.

There was a line of cases confirming the steps that the magistrates' court had to take starting with *R v Liverpool Magistrates' Court ex p Ansen.*[1286] In *Ansen* the High Court held that there was no statutory need under section 82(3) MCA 1980 for the magistrates' court to hold a means inquiry, although in that case the court relied on the fact that the defendant was serving a period of imprisonment. The court accepted that despite the fact there was no statutory need for a means inquiry, it is good practice to hold one before activating the default term, as there may be other means of enforcing the order short of committal.

The statute was considered in the correct order in *R v Hastings and Rother Magistrates' Court ex parte Anscombe,*[1287] in which it was held that the magistrates' court had the

[1283] POCA 2002, s 35(2A).
[1284] PCC(S)A 2000, s 140(1).
[1285] In *Gibson* the court noted that a confiscation order is premised on the means to pay (n 12) [19].
[1286] *Ansen* (n 536).
[1287] *Anscombe* (n 20).

power to commit a defaulter to prison without a means inquiry as the requirement in section 82(4) only applied if the court was bound by section 82(3), which it was not here as the period of imprisonment in default had been set on imposition.

Ansen and *Anscombe* considered the case of *Harrow Justices*[1288] which turned on slightly different facts given that it concerned a confiscation imposed under the DTOA 1986 and the result of the magistrates imposing a default sentence was that the defendant no longer needed to pay the confiscation order. Amongst other findings, it was held that the magistrates' court was wrong to issue a warrant of commitment without enquiring into the defendant's means. Committal would have had the same result in R *(on the application of Garrote) v City of London Magistrates' Court,*[1289] when again the court held that the magistrates' court must consider all methods of enforcement short of issuing the committal warrant, as the confiscation order had been made under the CJA 1988 before it was amended, so that serving the default sentence wiped out the debt.

Although the magistrates' court does not have to hold a statutory means inquiry, it does have to take the means of the defendant into consideration and ensure that there are no other ways of enforcing the order short of committal.[1290] It has been made clear that the court must consider all other enforcement options before issuing the warrant even if it is difficult to see what other options are available, and can adjourn for payment to be made.[1291] However, the defendant must produce 'hard evidence' before the court should adjourn in such circumstances.[1292]

The cases of *Harrow Justices* and *Garotte* were followed in *Barnett v DPP*[1293] when the court confirmed that although there is no statutory requirement, the magistrates' court should be satisfied that there is no alternative method of enforcement before activating the

[1288] *Harrow Justices* (n 524).
[1289] [2002] EWHC 2909 (QB).
[1290] *Ansen* (n 536).
[1291] *R (on the application of Coram) v South Bedfordshire Justices* [2004] EWHC 3023 (Admin).
[1292] *John Smith* (n 530) [5] (Thomas LJ).
[1293] [2009] EWHC 2004 (Admin).

default term. It considered it unnecessary to consider whether a finding of wilful refusal or culpable neglect was required before activating the default term but noted that counsel agreed that there is no statutory need for such a finding.[1294]

More recently there has been a second line of judicial decisions in which it has been held that the magistrates' court must find wilful refusal or culpable neglect before activating the default term.[1295] In *Munir* the High Court correctly identified that the magistrates' court did not need to conduct a means inquiry as required by section 82(3) MCA 1980. However, the judgment then went on to say that sections 82(4) and (4A) had to be complied with and the magistrates' court must find wilful refusal or culpable neglect before imposing the default term. It is suggested that the Court was in error as section 82(4) and (4A) only have to be considered if the magistrates' court is acting under section 82(3) and that sub-section is only considered if the court *did not* impose a default term on imposition.

In *Johnson* the Court reviewed the decision of the district judge to find wilful refusal but did not review the legislation in detail, although Irwin J did say that the requirements of section 82(4) must be applied practically in every case, that is, it is enough for the court to have regard to the other methods, not that they must be tried and have failed before the default term can be imposed.[1296] In *Cooper* the Court considered the decision of the district judge in the magistrates' court to find culpable neglect citing section 82(4) MCA 1980. Again, there was no detailed consideration of the legislation, but the Court followed *Munir* and *Johnson* by holding that there was a need for wilful refusal or culpable neglect to be found.

These cases were followed in *Sanghera* and the Court held that the district judge in the magistrates' court had not followed the statute and should have found wilful refusal or

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[1294] ibid [19].

[1295] *Munir v Bolton Magistrates' Court* [2010] EWHC 3794 (Admin)*; On the application of Johnson* (n 1198); *Cooper v Birmingham Magistrates' Court* [2015] EWHC 2341 (Admin); *R (on the application of Sanghera) v Birmingham Magistrates' Court)* [2017] EWHC 3323 (Admin); *Beach* (n 1262).

[1296] *On the application of Johnson* (n 1198) [38]-[39].

culpable neglect. In this case the Administrative Court considered the legislation but started by looking at section 82(4). In *Beach* the decision in *Johnson* was referred to, along with *Harrow Justices,* and again the High Court started its considerations with section 82(3) and (4) and therefore found that the magistrates' court should have found either wilful refusal or culpable neglect. *O'Connell* is a case on a different point but outlines the powers of the magistrates' court in relation to activating the default term for non-payment of a confiscation order, and it too begins with the premise that the starting point of the magistrates' court decision is section 82(4) MCA 1980.[1297]

For the reasons given above it is submitted that the starting point in the second line of authorities is not correct, and the first line of authorities are to be preferred. In the second line of authorities the Court should have started with the question posed by section 82(3), namely was a period of default for non-payment set on imposition? If that question had been asked, the answer would have been yes, and the rest of section 82 would not have been considered. These conclusions are supported by Sutherland Williams et al who conclude that *Munir* should not be followed and that there is no need to prove wilful refusal or culpable neglect, although the court must be satisfied that there are no alternative methods of enforcement.[1298]

Until there is an appeal to a higher court, or there is a change in the legislation it would seem that these issues will continue to be raised in practice and would appear to be another area of the law in which clarity is needed. Despite that, the principles established by the case law mean that the claim that 'means enquiries may now be a thing of the past in this regard'[1299] cannot be right. Although no 'means inquiry' as required by s 82 MCA 1980 is necessary, an inquiry into means is.

[1297] *O'Connell* (n 79) [4].
[1298] Sutherland Williams, Hopmeier and Jones (n 58) 293-294.
[1299] Simon Whitehead, 'Dealing with unpaid confiscation orders-2' (2000) 150(6924) NLJ 284.

6.7 Adjournments

There are other factors which in practice the magistrates' court has to deal with. Either before the hearing, or as part of the hearing, the court may be asked to consider an application to adjourn the hearing. Applications to adjourn enforcement hearings in a magistrates' court for an application for a certificate of inadequacy or downward variation are common.[1300] There have been a number of cases where arguments have been put forward on behalf of defendants that their enforcement proceedings should be adjourned to allow an application for a certificate of inadequacy,[1301] but there can be other types of appeal, for example, against sentence or the confiscation order.

Although a magistrates' court can adjourn enforcement proceedings, and can further postpone the issue of a warrant of commitment,[1302] it cannot extend the time for payment of a confiscation order.[1303] As a result interest will accrue during the period of the adjournment at the rate of 8% per annum until the order is satisfied. Therefore, it may not always be in the defendant's interest to delay matters especially as the prosecution can apply to increase the default sentence in certain circumstances if interest accrues. Following *Gibson*, it may now be more difficult to enforce interest[1304] which is another reason why in practice enforcement should not be delayed.

The Working Group Third Report blamed delays in enforcement in part on the fact that a confiscation order cannot be enforced while an appeal is outstanding against conviction or sentence, which meant that enforcement is suspended pending appeal.[1305] However, the approach has now changed. In 2014 case law clarified the principles that the magistrates' court should adopt when enforcing a confiscation order which is subject to an appeal by

[1300] Sutherland Williams, Hopmeier and Jones (n 58) 254; *Mitchell Taylor and Talbot* vol 1, para 8.004 (R5: September 2004). This would include an application for a certificate of inadequacy under the pre-POCA 2002 legislation, and an application for a downward variation under section 23 POCA 2002 due to inadequacy.
[1301] For example *Ansen* (n 536); *Anscombe* (n 20).
[1302] MCA 1980, s 77.
[1303] *Greenacre* (n 1021).
[1304] As the default term does not apply to outstanding interest, *Gibson* (n 12).
[1305] Working Group Third Report (n 126) para 2.6.

the defendant. Prior to the case of *Day*[1306] there was no clear direction from the case law, and there was nothing to say that a fine or confiscation order must be enforced while there is an appeal pending. In some cases, case law has allowed enforcement to be suspended pending appeal;[1307] whereas in others the decision of the magistrates' court not to adjourn was upheld.[1308]

Adjournments had been granted, despite the case of *May and Others*,[1309] which confirmed that the time for paying a confiscation order runs from the date of imposition and not from the determination of an appeal against it. It was held that the proposition that the time for paying a confiscation order runs from the date of determination of an appeal against it is unsound in law.[1310]

In *Day*[1311] the Lord Chief Justice criticised the practice by HMCTS of suspending the enforcement of accounts pending an appeal. Although this case involved the enforcement of fines and costs and not a confiscation order, the same principles apply, and it was held that any general practice of 'suspending' enforcement must cease.

In one of the footnotes to the judgment the Court gave guidance on the principles to be applied if a defendant appealed against sentence.[1312] These principles include points directly relevant to the enforcement of confiscation orders. The court stated that in future, the fact that a defendant has been told by HMCTS that an account has been suspended will not be sufficient to prevent criticism of a defendant for not paying as ordered by the

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[1306] *Day* (n 1018).
[1307] In *R v Soneji and another* [2006] EWCA Crim 1125 [11] it was said 'in passing' that the convention of not automatically enforcing fines pending appeal is a matter of practice, not founded on statute or regulation and has never been held to extend to confiscation orders. *In R (on the application of Shahid) v Birmingham Magistrates' Court* [2010] EWHC 2969 (Admin) there was no criticism of the district judge for issuing the commitment warrant when he did as the defendant had not applied for a certificate of inadequacy, even though the decision to commit could not stand as the circumstances had been transformed by the certificate of inadequacy.
[1308] See *Anscombe* (n 20); *Hamed v City of Westminster Magistrates' Court* [2010] EWHC 665 (Admin)*; R (on the application of P) v Bolton Magistrates' Court* [2010] EWHC 1812 (Admin).
[1309] *May and others* (n 1018).
[1310] ibid [5] (Keene LJ).
[1311] *Day* (n 1018).
[1312] ibid [52]-[58].

court. This changes the position taken in the case of *Minshull v Marylebone Magistrates' Court*[1313] where a letter from the clerk to the justices led Pitchford J to opine that:

> [the] letter…had the effect of securing the postponement of any enforcement of the confiscation order. It seems to me that it was virtually inevitable that no proceedings for enforcement would, in any event, have taken place pending the appeal against the order itself.[1314]

The case of *Day* confirmed that the fact that an appeal is pending does not suspend the operation of any sentence or order of the Crown Court including imprisonment, payment of a fine, costs or confiscation order. The footnote sets out that this is because any order is enforceable in accordance with its terms in the absence of the exercise by a court of any power to the contrary and explains that this is why an applicant sentenced to imprisonment who seeks leave to appeal goes at once into custody and has to apply for bail under the statutory powers given to the Court of Appeal and the Crown Court. In the same way an appellant given community service has to carry the sentence out.[1315]

The court acknowledged that there may be occasions for specified reasons applicable to the particular circumstances of a given case or type of case where the Executive Branch of the State, namely HMCTS, may decide not to enforce a type of case pending an appeal. However, it was made clear that decision cannot and does not suspend the order of the court. The decision does not in any way discharge the offender from the obligation to obey the order of the court and pay the order within the time specified by the court or be at risk of the penalty in default of payment.[1316]

The judgment was critical of the fact that the decision to suspend enforcement was taken without reference to the Crown Court or the prosecution especially as the prosecution

[1313] [2008] EWHC 2800 (Admin), [2010] 1 WLR 590.
[1314] Ibid [36] (Pitchford J).
[1315] *Day* (n 1018) [55].
[1316] ibid [57].

were of the view that the order should be paid as quickly as possible.[1317] The case concerns non-payment of fine and costs, an area where in practice agencies do not work closely together as they do in the enforcement of confiscation orders. Given the closer working relationship,[1318] it is unlikely that HMCTS or the court would take a decision to suspend the enforcement of a confiscation order without putting the prosecution on notice, and given the accrual of interest, it will rarely be in the defendant's best interests to delay enforcement.

The court in *Day* followed other cases. In *West Midlands Probation Board v Sutton Coldfield Magistrates' Court*[1319] the court held that an appeal against sentence did not suspend the enforcement of a community order. This decision followed *May and others*[1320] and *Manchester Probation Committee v Bent.*[1321] *Bent* was another case in which it was held that an appeal did not suspend the enforcement of a community order. This was on the basis that a sentence is enforceable in the absence of specific provisions to the contrary, although the judgment acknowledged that a fine may not be enforced but that would be for practical reasons and not because of any principle of law.

May and others concerned the enforcement of a confiscation order pending appeal and followed *Bent* by deciding that an appeal does not suspend the operation of the confiscation order. However, the judgment in *May* does not go as far as that in *Day.* In *May* the court did not say that the confiscation order should be enforced while the appeal was pending but that the defendant should have taken 'steps preparatory to the raising of the money specified in the confiscation order… [as he] was not entitled to assume that his appeal would be successful'[1322]

[1317] ibid [54].
[1318] In practice HMCTS works closely with other agencies, especially the prosecution and financial investigators who can provide information about the Crown Court hearing.
[1319] [2008] EWHC 15 (Admin), [2008] 1 WLR 918.
[1320] *May and others* (n 1018). Relied upon in *Day.*
[1321] [1996] 160 JP 297 (QB).
[1322] *May and others* (n 1018) [7] (Keene, LJ).

Now, following *Day* the principles to be followed by the magistrates' court when deciding whether or not to adjourn pending appeal in confiscation cases are clear. Decisions should be based on the premise that the starting point is to continue with the enforcement of the order. In addition, reference to the prosecution, and if appropriate, the Crown Court, should be made before a decision is made to adjourn.

There are other principles in the case law to guide the magistrates' court when there is a request from the defendant for an adjournment. If the defendant either himself or through his advocate asks for an adjournment to satisfy the order, the magistrates must ensure that steps have been taken to satisfy the order. In *John Smith* Thomas LJ stated:

> It is self-evident and important to note that no leeway whatsoever should be given to anyone subject to a confiscation order unless there is hard evidence in the form of money deposited or properties secured that show that the sums are being realised. A simple assurance from a lawyer is totally worthless and should not be acted on in the absence of hard evidence of the kind we have described.[1323]

Cases where the asset available is a house are particularly relevant to this research. Where a defendant had done all he could to sell his house and the sale fell through just before the court hearing, a district judge was criticised for issuing a warrant of commitment. It was held that the court should have adjourned the proceedings to allow a further sale to be attempted. In this case, there was no reason to believe that the property could not be sold and there was no suggestion that the defendant would block or refuse to co-operate with the sale. The fact that an application to adjourn had been made with the agreement of the CPS was not determinative of the issue but was another matter to be taken into account.[1324]

However, when the defendant had not made genuine efforts to sell his property, the magistrates' decision to refuse an adjournment and commit the defendant to prison was

[1323] *John Smith* (n 530) [5].
[1324] *Barnett v DPP* (n 1293).

upheld as the only method of enforcing the confiscation order.[1325] The defendant had sufficient equity in the property to meet the value of the confiscation order and the interest but had failed to place the house for sale on the open market. He asked for an adjournment to sell the house to his son at an undervalue which would not have satisfied the order. The magistrates were wholly unpersuaded that the defendant was making genuine efforts to meet his obligations under the confiscation order, or that he was serious in looking after the public interest before his own. This was shown by his attempt to keep the property within his family by selling it to his son, which was an unsubstantiated offer. The defendant had been disadvantaged because the enforcement hearing had been brought forward, but he had had 10 days to prepare. He had also had nine months prior to the hearing to sell the property but had failed to do so.

In *Popoola*[1326] the decision of the district judge not to adjourn the enforcement proceedings in the magistrates' court for property to be sold was upheld. In this case no steps had been taken to realise two of three properties and it was held that the judge did not err in refusing to allow a further adjournment when nothing had been paid and nothing done since the confiscation order was made. The decision to commit the defendant to prison for non-payment was upheld. In this case there was a restraint order in force and it is argued that this is authority for the proposition that even if there is a charging order on a property, the onus would still be on the defendant to take steps to sell the property and it would not prevent further enforcement action. It would be for the magistrates' court to make a decision on the facts of each case.

It is submitted that the making of a compliance order by the Crown Court where the asset is a house would also assist the magistrates' court when faced with an application by the defendant to adjourn enforcement proceedings and would be seen as an innovative use of

[1325] *R (on the application of Jestin) v Dover Magistrates' Court* [2013] EWHC 1040 (Admin).
[1326] *Popoola* (n 1198).

the order.[1327] A compliance order could be used to require a defendant to market a house for sale. Conditions could be imposed to market the property within a set timescale with a requirement to provide written proof to the lead agency. As a compliance order can be made against a third party the order could require any estate agent to provide details of whether the house is being marketed at an appropriate price, how many viewings have been undertaken and whether any offers have been made. The estate agent could also be required to give an opinion about whether any offers are reasonable. A failure to comply with the requirements of the compliance order would then be a matter that the magistrates' court could take into account when deciding whether the defendant was making genuine efforts to sell the property. This would allow a decision to be made about whether it is reasonable to adjourn the enforcement hearing to allow the property to be marketed further before activating the default term.

6.8 The right of a defaulter to have proceedings concluded within a reasonable time

Although the onus is on the defendant to satisfy the order, the court must take care to ensure that there is no unnecessary delay in enforcing a confiscation order, even if the defendant has applied for an adjournment or has caused the delay in another way, otherwise methods of enforcement may not be available. The ECHR applies to the enforcement of confiscation orders, nowhere more so than with the issues of delay. The European Court of Human Rights has determined that the reasonable time provisions of Article 6(1) apply to the entirety of the confiscation proceedings and that orders must be made[1328] and enforced[1329] within a reasonable time. This applies to enforcement actions

[1327] The power to make a compliance order is contained in POCA 2002, s13A and it gives the Crown Court the power to make any order to ensure a confiscation order is effective. The innovative use of compliance orders has been suggested by Fisher (n 60) 759; and Wood, The Big Payback (n 5) 7.
[1328] *Bullen and Soneji v United Kingdom* (n 518).
[1329] *Crowther v United Kingdom* (n 519).

taken outside the courtroom, and to the enforcement powers of the magistrates' court at the enforcement hearing.

It is necessary to consider the rights of the defendant lest it appears that there is no balance in the system. Article 6 of the ECHR and the principles of natural justice apply to confiscation enforcement hearings in the magistrates' court. The defendant must be given sufficient prior notice of an enforcement hearing and time to prepare his defence. Where a defendant could not instruct his own solicitor in advance of the hearing, because he was in custody and had been in transit; he could not avail himself of the duty solicitor and the case was complex, the refusal of an adjournment by the magistrates' court was held to be a breach of Article 6 of the ECHR.[1330]

In *ex parte Crowther*[1331] which was decided prior to the HRA 1998, there was a delay in the enforcement of a confiscation order made under the DTOA 1986 including an unexplained three year delay on behalf of the enforcement authorities. It was held that a delay was not an abuse of process on the basis that there is a duty on the defendant to satisfy the order, although the situation may be different if there was fault by the prosecution.

The first United Kingdom case to consider the application of article 6(1) on the decision to commit a defendant to prison for non-payment of a confiscation order was *Lloyd.*[1332] The court specifically considered whether a defendant's article 6(1) rights to have a case dealt with within a reasonable time can be violated by a delay in proceedings to commit a defendant to prison for non-payment of a confiscation order. The confiscation order had been made under the CJA 1988 and the defendant was ordered to pay within 12 months or be liable to serve 18 months in default and the court heard that there had been delays in enforcing the order by both the prosecution and the magistrates' court. The prosecution had delayed the application to appoint a receiver, and once appointed, no action was

[1330] *Agogo* (n 521).
[1331] *ex parte Crowther* (n 1198) 1019. The facts are also contained in *Lloyd* (n 530).
[1332] *Lloyd* (n 530).

taken to enforce the order. The magistrates' court had delayed both the issue of a summons and the listing of the enforcement hearing, so by the time the the defendant was committed to prison for non-payment of the confiscation order it was five years from when the time for payment date had expired.

By the time of the hearing in *Lloyd* Mr Crowther's complaint to the European Court of Human Rights had been declared admissible, however the High Court did not feel it was appropriate to wait for his case to be decided as it was felt that it would take too long for the European Court of Human Rights to determine the matter. Nor did it feel bound to follow *ex parte Crowther* as the court in that case had not heard an argument on whether a breach of article 6(1) had occurred, but whether a committal to prison for non-payment of a confiscation order after a considerable delay was an abuse of process.[1333]

In *Lloyd* the court held that a defendant enjoys the full benefit of all the rights conferred by Article 6(1) in all aspects of confiscation proceedings including an application to commit in the magistrates' court. This is because it forms part of the sentencing process as outlined in *Rezvi*,[1334] *Benjafield*[1335] and *Phillips.*[1336] In *Lloyd* there had been a five-year delay in enforcing the order, during which time the defendant had rebuilt his home life, and accordingly there had been a breach of Article 6(1). The original order to commit the defendant to prison was stayed and the court held that the proportionate response to such a breach is to say that imprisonment in default is no longer available. However, the court acknowledged that other methods of enforcement, what Dyson LJ referred to as 'the civil means of enforcement',[1337] remained. This term refers to the other methods of enforcement available to the magistrates' court short of committal such as a warrant of control. The court heard no argument about whether article 6(1) applied to the enforcement of a confiscation order using the civil methods of enforcement.

[1333] ibid [21].
[1334] *Rezvi* (n 501).
[1335] *Benjafield* (n 502).
[1336] *Phillips v United Kingdom* (n 500).
[1337] *Lloyd* (n 530) [17].

The judgment highlighted the fact that defendants subject to a confiscation order do not attract sympathy nor are they entitled to favoured treatment but if the prosecutor or magistrates' court wants to enforce a confiscation order, they should do so within a reasonable time. Otherwise it is potentially very unfair for a defendant to be committed to prison in default many years after the time for payment has expired and after having been released from custody and resumed work and family life.[1338]

The court acknowledged that the threshold of proving a breach of the reasonable time requirement is a high one following *Dyer v Watson*,[1339] and regard should be had to the efforts made to extract the money by other methods. The example given in *Lloyd* was that if a receiver has been appointed within a reasonable time and acted with reasonable expedition then even if that had taken time it will not prevent the court finding that there has been no violation of the defendant's article 6(1) rights. Regard should be had to the efforts made to extract the money by other methods and if the defendant has been evasive and avoided diligent attempts to extract the money from him, he will be unable to rely on the delay to support an argument that his rights have been violated.[1340]

In *Lloyd* the delay amounted to approximately five years and was caused by the prosecution and the magistrates' court. As a result, the High Court held that the correct remedy for the breach of article 6(1) was to stay the committal proceedings. This is because of the time that had elapsed since the defendant was released from prison on licence after serving one half of the original sentence, and he had rebuilt his home life and obtained employment. The court held that it would be inhuman to subject the claimant to a further term of imprisonment arising out of the original offence.[1341] In the final paragraph of his judgment, Dyson LJ stated:

[1338] ibid [25].
[1339] [2002] UKPC D1, [2004] 1 AC 379.
[1340] *Lloyd* (n 530) [27].
[1341] Ibid [34].

> If the authorities whose task it is to enforce confiscation orders are so slow in communicating with one another or in activating enforcement mechanisms that they become in breach of Article 6(1), then the appropriate remedy may well be (as in this case) that the weapon of imprisonment in default is lost. The sooner this is appreciated by all agencies of the criminal justice system, the better.[1342]

It has been said that the decision in *Lloyd* 'is a bold decision but, it is submitted, a correct one' as although the reasonable time guarantee applies throughout the criminal process including appeals, this case applied the guarantee to the enforcement of confiscation orders.[1343] It was a brave decision by the High Court because Mr Crowther's application had been declared admissible in the European Court of Human Rights on the same point. The High Court acknowledged that the decision would probably be decisive on the point before it, however the decision would not be known for one or two years and the parties were keen to proceed, which it did.[1344] History has shown that the decision was right, as is shown in the analysis of the case law which followed, and in 2017 Edis J described the decision in *Lloyd* as being 'vindicated' by the decision in *Crowther v United Kingdom*.[1345] This application of the reasonable time guarantee to the enforcement of confiscation orders adds further balance to the draconian nature of the confiscation legislation.

The European Court of Human Rights heard the case of *Crowther v United Kingdom*[1346] in 2005 and considered the judgment in *Lloyd*. It held that article 6(1) of the Convention applied to the enforcement of confiscation orders and that four years of almost total inactivity on behalf of the prosecution was a violation of article 6(1) of the Convention. It found that the prosecution's inertia during that time 'was both inexcusable and, given that somebody's liberty was involved, unconscionable'.[1347] It held that the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the

[1342] ibid [36].
[1343] Dilys Tausz, 'Confiscation Orders' [2004] (Feb) Crim LR 136, 137.
[1344] *Lloyd* (n 530) [12].
[1345] *O'Connell* (n 79) [22].
[1346] *Crowther v United Kingdom* (n 519).
[1347] ibid [28].

case including the complexity of the case, the conduct of the defendant and the authorities, and the importance of what was at stake for the defendant.[1348] The domestic court had found that the defendant had a duty to pay the order, which gave weight to the fact that there was no abuse of process, but the European Court of Human Rights held that the fact that the defendant was under a duty to pay did not absolve the authorities from ensuring that the proceedings were completed in a reasonable time.[1349]

These principles were confirmed in *Minshull v United Kingdom* which also considered the decision in *Lloyd.* Notwithstanding the complexities of the proceedings, the court held that a period of delay *attributable to the State* of four years and 7 months for the domestic courts to consider an appeal was unreasonable and there was a breach of the reasonable time requirement of Article 6 as the defendant had been committed to prison for non-payment of the confiscation order.[1350]

The principles in *Lloyd*, *Crowther v United Kingdom* and *Minshall v United Kingdom* were followed in *Marsden and McIntosh*[1351] which also held that it was right to take into account the fact that a defendant is aware of the Crown's continuing intention to enforce the order. It was held that the fact that the defendant is under an obligation to pay does not in itself mean that the State does not have to act within a reasonable time.[1352] The court will also take into account that the result of the enforcement proceedings may be that a released prisoner will be returned to jail.[1353] In this case, however, it was not perverse to refuse to stay enforcement proceedings, even though there had been significant delays, as the offenders had known about the prosecution's intention to enforce the orders. Looking at the whole of the circumstances the offenders' rights under Article 6 had not been breached.

[1348] ibid [27].
[1349] ibid [29].
[1350] (2012) 55 EHRR 36; (emphasis added).
[1351] *Marsden and McIntosh* (n 1198) 1019.
[1352] ibid [7], [16].
[1353] ibid [7].

Lloyd and *Crowther v United Kingdom* were also followed in *R (on the application of Syed and another) v City of Westminster Magistrates' Court.*[1354] In this case it was held that if the defendant is responsible for the delay, or if his financial affairs take an unusually long time to sort out, for example because of their complexity, article 6(1) will not help him.[1355] Secondly, if the delay is found to have infringed article 6(1), the appropriate remedy is for the enforcing court to stay the proceedings to the extent that the prosecuting authority is seeking an order requiring the defendant to serve the sentence of imprisonment imposed in default of payment.[1356] The case did confirm that culpable delay in enforcing a confiscation order could constitute a breach of a defendant's right under article 6(1) of the Convention to a fair trial within a reasonable time.[1357]

There are other cases which considered the delay principles but did not add further to the factors to be taken into account when deciding the issue. Where there was 'an inexcusable delay of over two years' by the enforcement authority, it would be an abuse to continue to enforce the order by way of committal to prison.[1358] A delay of 13 years in enforcement meant that the defendant's Article 6(1) rights had been breached and the decision to commit the defendant was quashed.[1359] On the other hand, in *Deamer v Southampton Magistrates' Court*[1360] a delay of 6 years was not unreasonable when the defendant delayed proceedings and failed to apply for a certificate of inadequacy, with correspondence between prosecution and defence throughout the period making it clear that if the funds were not forthcoming the prosecution would take enforcement proceedings.

However, the decision in *Deamer* should not be interpreted by prosecution authorities as justification for delaying enforcement. Apart from the practical advantages of enforcing

[1354] [2010] EWHC 1617 (Admin).
[1355] ibid [14].
[1356] ibid [15].
[1357] ibid [12].
[1358] *Flaherty v City of Westminster Magistrates' Court* [2008] EWHC 2589 (Admin) [22] (Moses LJ).
[1359] *R (on the application of Stone) v Clerk to the Justices of Plymouth Magistrates' Court* [2007] EWHC 2519 (Admin).
[1360] [2006] EWHC 2221 (Admin).

confiscation orders quickly, namely that any assets will be more likely to be available and to have retained their value, future judgments may not allow as much leeway. In addition, there is now the additional issue in enforcing the interest after the default term has been imposed following the case of *Gibson*.[1361]

In a judicial review it has been held that where human rights are involved the court must conduct a review that is more intense than the *Wednesbury* test of irrationality.[1362] The *Wednesbury* reasonableness test is whether a decision taken is beyond the furthest reaches of objective reasonableness.[1363] This question was considered in *R (on the Application of Derek Joyce) v Dover Magistrates' Court and Revenue and Customs Prosecutions Office*.[1364] In *Joyce* the court decided the delay question on the common law abuse of process law but took into account the decision in *Lloyd.* The court held that the decision of the magistrates' court to refuse to stay proceedings was not *Wednesbury* unreasonable even though there was a 14 year delay in enforcing the order because a significant part of the delay was caused by the defendant as he was unlawfully at large for 3 years and 1 month. However, it was held in this case that the court could not enforce the order by way of committal, but it could enforce the order by any other methods of enforcement available.

By deciding the case on the abuse of process point, *Joyce* is the exception to the long line of cases starting with *Lloyd* in 2003 which have decided the question of delay taking into account the principles in article 6(1) of the ECHR. In 2017 the case of *O'Connell* confirmed that it is the article 6 rights which should be considered because article 6 and the reasonable time guarantee is part of domestic law, and there is no need to decide cases concerning the enforcement of confiscation orders in any other way.[1365] This

[1361] *Gibson* (n 12).
[1362] *R (on the application of E) v DPP* [2011] EWHC 1465 (Admin), [2012] 1 Cr App R 6.
[1363] *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 (CA), [1947] 2 All ER 680.
[1364] [2008] EWHC 1448 (Admin).
[1365] *O'Connell* (n 79) [36].

decision reviewed a number of previous key authorities in some detail,[1366] and it appears the law is now settled and any arguments that a court or prosecutor has delayed the enforcement of confiscation orders should be considered taking into account the defendant's article 6 rights.

In *O'Connell* there had been just over 11 years between the dismissal of an appeal against the making of the confiscation order and the issue of the warrant of commitment. The claim was that instead of activating the default term, the magistrates' court should have stayed the proceedings as an abuse of process relying on the power of the court to stay and his article 6 rights to have the proceedings heard within a reasonable time. It was held that it is only necessary to consider whether the imposition of a default sentence for non-payment of a confiscation order violated the reasonable time Convention right, and not whether there has been an abuse of process. In addition, the High Court considered the principles to be taken into account when considering the application of a defendant's article 6 rights.

Edis J agreed with the interpretation of *Lloyd* by Laws LJ in *Marsden and McIntosh* that the conduct of the defendant is irrelevant to the existence of his Article 6 right, but highly relevant as to whether there had been a breach, and if so, what the remedy should be.[1367] But in this case Edis J said that it was not helpful to consider previous decisions which turn on their own facts. Something more is needed other than the fact that a court has decided that a warrant of commitment should not be issued because the CPS had delayed for a particular couple of years. He concluded that consideration should be given to those cases which concern the principles of delay in the context of confiscation enforcement by imprisonment in default of payment.[1368] He also found it was wrong to cite *Lloyd* as authority for propositions that a court will always stay enforcement proceedings where there has been unreasonable delay, or that the conduct of the defendant is not

[1366] Although it did not consider *Minshall v United Kingdom*.
[1367] *O'Connell* (n 79) [27] (Edis J).
[1368] ibid [19].

relevant to the decision about whether there has been a breach of the reasonable time requirement, or what order to make if there has been a breach.[1369]

The approach set out by Lord Bingham in *Dyer v Watson*[1370] was held to be relevant in *O'Connell* when deciding if there has been a breach of the reasonable time requirement in Article 6 in confiscation order enforcement.[1371] The steps identified were first to look at the period of time which has elapsed, as unless there are grounds for real concern, the argument is unlikely to go further. Three factors are then to be taken into account. Firstly, the complexity of the case, as the more complex the case the longer the time needed to prepare, although the passage of time can become excessive and unacceptable even in a complex case. Secondly the court should have regard to the conduct of the defendant, if he has caused delay for example by making spurious applications, changing legal advisers and absenting himself. Thirdly unacceptable delays cannot be blamed on lack of availability of courthouses or judges or chronic underfunding of the legal system. However, this does not mean that the 'practical realities' of the legal system should not be considered, and it is reasonable, for example, for a prosecutor to prioritise cases. Any unjustified delay will point to a breach of the reasonable time requirement. [1372]

In *O'Connell* the fact that the prosecution did not apply for a European Arrest Warrant or prioritise the case because the defendant was not in the jurisdiction was not unreasonable. When deciding whether it would be unjust or disproportionate to impose the warrant of commitment in default, the court must look at the facts and circumstances of the particular case.[1373] Also taken into account was the fact that the defendant had done nothing to pay the order since the dismissal of his appeal 10 years ago; and was living abroad, which was his choice. It was therefore held that it was not unjust or

[1369] ibid [29].
[1370] *Dyer v Watson* (n 1339).
[1371] *O'Connell* (n 79) [33].
[1372] ibid [31].
[1373] ibid [43], [47].

disproportionate to issue the warrant of commitment and not grant a stay to remove the possibility of imprisonment for non-payment.

Considering the cases of *Lloyd, Crowther v United Kingdom* and *Marsden and McIntosh* the principles established in *O'Connell* are:

- The question to be decided is whether in the circumstances of the case, would the issue of a warrant of commitment after a period of delay be so unjust and disproportionate?
- The application should be heard and considered on its merits
- Each case will be fact specific and a period of delay may result in a stay in one case, where a shorter delay may result in a stay in another case
- Misconduct by the prosecution is one factor to be taken into account
- The prosecution is entitled to prioritise its cases
- Conduct by the defendant is another factor
- Just because there has been a delay does not mean that a committal warrant cannot be issued
- Where a defaulter is out of the jurisdiction and his whereabouts are unknown, delay caused by a decision not to proceed in their absence will rarely be capable of amounting to a stay
- It should not be assumed that there will be a greater hardship in imprisoning a defendant for default after a period of delay.

The Court in *O'Connell* did not find it useful to consider the other cases on delay, finding that the application of the principles to a set of facts without something more was not helpful. However, the other cases are useful in the context of this research to show that if a defendant's article 6 rights are infringed in a way that is disproportionate, either all enforcement can be stayed, or the option of committal to prison can be stayed.

6.9 Civil means of enforcement

In *Lloyd* the court did not consider the point whether civil means of enforcement (powers of the court short of imprisonment in default) were available[1374] but that has been considered in other cases. Where domestic law or practice requires the parties to take the initiative with regard to the progress of the proceedings, the State is obliged to ensure compliance with the reasonable time guarantee under Article 6(1).[1375] Where the defendant remained at a fixed address known to the authorities and attended court whenever required and did not attempt to prolong the proceedings unnecessarily it was unlikely that any enforcement would be permitted if there has been an unjustified delay.[1376]

There is some guidance from the case law on when civil enforcement is still an option available to the magistrates' court even if delay in enforcement means that the imposition of the default term is no longer an option. It was held in *CPS v Derby and South Derbyshire Magistrates' Court* that preventing repayment by the defendant was not a proportionate response to the delay in the prosecution seeking to enforce by way of criminal sanction.[1377] In that case it was held that while an unreasonable six-year delay amounted to a breach of article 6, it was inappropriate and disproportionate to prevent enforcement by civil means of enforcement. It was unreasonable for a defendant to be at risk of imprisonment after a delay of six years when the defendant was by then an elderly man where the conviction was well spent, the sentence had been served, and he was now living his life as a pensioner.[1378] In addition the defendant had been paying minimal amounts and then for no apparent change of circumstances the prosecutor sought a

[1374] *Lloyd* (n 530) [24].
[1375] *Crowther v United Kingdom* (n 519).
[1376] ibid [23], [29].
[1377] [2010] EWHC 370 (Admin) [26].
[1378] ibid [23]-[24].

hearing which could have resulted in committal to prison for non-payment.[1379] However, civil methods of enforcement were available.

In certain circumstances all enforcement of a confiscation order by the magistrates' court including committal and civil means of enforcement can be stayed. In *Flaherty* the defendant had served the term in default after a significant delay, and there was then a further delay of two years where the court could have found the address for the defendant. The fact that HMCS had set up a new unit to deal with confiscation orders was not accepted as an excuse for only writing one letter to the defendant in over two years, and the enforcement proceedings were stayed.[1380] Similarly, where the prosecution had caused an unexplained delay of six and a half years and had failed to respond to the defendant's correspondence, all enforcement was stayed, although this did not affect monies already paid by the defendant.[1381]

As a result, the principles that can be gleaned are that if the court or the prosecution could have done something but either chose not to or neglected to do so, then all enforcement can be stayed. Otherwise, civil means of enforcement will be available, and these are analysed in the next chapter.

6.10 Conclusions of chapter

Previous chapters have already identified some of the complexities in the confiscation legislation for magistrates' courts enforcing confiscation orders. This chapter shows the complex nature of the use of fines based powers for the enforcement of confiscation orders. The changes to the confiscation legislation have resulted in the magistrates' court enforcing orders with different sanctions and the use of fines based powers has caused more issues. A review of section 35 POCA 2002 is recommended to ensure that the individual fines based powers are suitable for enforcing confiscation orders.

[1379] ibid [22].
[1380] *Flaherty* (n 1358).
[1381] *Malik v Crown Prosecution Service* [2013] EWHC 4591 (Admin).

Some suggestions have been made to improve the enforcement powers of the magistrates' court, for example the use of fine registration. A limited form of these powers is available if a collection order is made and there may be a function for collection orders and the added sanctions they bring in the enforcement of confiscation orders. A detailed analysis falls outside the focus of this thesis but is recommended as an area suitable for further research.

By the time the case is listed in the magistrates' court for enforcement, it is at the end of the confiscation order process, interest will be accruing and there is a duplication of effort for the court when trying to enforce using the civil means of enforcement which is examined in the next chapter. It is recommended that the enforcement of interest following the case of *Gibson* is an area that would benefit from further research.

The activation of the default term is not automatic nor is it a punishment. The court must ensure that it considers all other methods of enforcement before issuing a warrant of commitment but it does not have to try them all. It would appear that further clarity is needed in relation to whether a finding of wilful refusal or culpable neglect is needed before activating the default term for non-payment. In addition, there are difficulties in enforcing confiscation orders after the default term has been served, and it is unlikely that the current civil means of enforcement would be successful if the defendant is in default of the principal sum. There is a need for effective alternatives.

The onus is on the defendant to pay a confiscation order, even if there is a restraint order and a receiver or an appeal pending. As a result, if there is a charging order, there would be no need for an order for sale in all cases before the default term is activated, each case would turn on its own merits.

There is a role for other agencies in the process, as they can identify assets available to satisfy the order including bank accounts and houses. A detailed review falls outside the scope of this research, but they can play a part in ensuring that the Crown Court has all

the relevant information to make the correct decisions to aid enforcement once the case is sent to the magistrates' court for enforcement.

There are particular issues in relation to marketing a house which has been considered in the case law. It is suggested that if the asset identified at the Crown Court is a house, then a compliance order could be made setting requirements that the defendant and any third party must comply with to ensure the confiscation order is satisfied.

An unacceptable delay in the enforcement of a confiscation order can amount to a breach of the defendant's article 6(1) rights which can lead to a stay of all enforcement actions or just prevent the activation of the default term. If other enforcement actions short of committal are available, these are known as 'civil means of enforcement.' These are explored in the next chapter.

Chapter 7 Enforcement: The use of Civil Means of Enforcement in the magistrates' court

7.1 Introduction

The last two chapters have critically analysed the powers of the magistrates' court to enforce confiscation orders, with the exception of the civil means of enforcement available. Civil means of enforcement are not to be confused with applications made in the civil courts, namely enforcement in the High Court or county court. In confiscation, the powers of the magistrates' court short of committal, which somewhat confusingly can include enforcement in the High Court or county court, have become known as civil means of enforcement. This is because of the case of *Lloyd* in which the court had to consider the options available to the magistrates' court when enforcing a confiscation order It considered the non-custodial options which could be taken by the court of its own volition without an application by the prosecutor and Dyson LJ said they would refer to the powers short of committal collectively as 'the civil means of enforcement'.[1382] These can either be ordered by the magistrates' court, or when enforcing a confiscation order by application to the High Court or county court by the designated officer.[1383] They can be used before or after the default term is activated.[1384]

Assets including houses or money in a bank account may have been identified as part of the confiscation order hearing at the Crown Court or can be identified at a later date and it is vital that there are practical enforcement options available to the magistrates' court to deal with them. This chapter examines the use of the non-custodial options available to the magistrates' court and in particular the use of charging orders. As a result of the issues involved, a recommendation is made that POCA 2002 is amended so that the

[1382] *Lloyd* (n 530) [17].

[1383] Some of the powers are available to the fines officer if there is a collection order in force.

[1384] The civil means of enforcement in the magistrates' court are also different to the civil recovery of the proceeds etc of unlawful conduct in Part 5 of POCA 2002. King and Walker highlighted the confusing terminology as in some jurisdictions civil recovery means following a criminal conviction, whereas in others it means recovery without a criminal conviction (n 11) 6-7. A review of the civil recovery provisions falls outside the scope of this thesis.

Crown Court can make a confiscation charging order, either as a direct alternative to restraint, or if there is no risk of dissipation as an order suspended until time for payment has expired.

The review documents highlight difficulties for the designated officer when applying for enforcement in the High Court and county court,[1385] and the limited options available to the magistrates' court once the default term has been activated.[1386] In order to examine why it is important for improvements to be made in these areas, it is necessary to consider the other non-custodial options available to the magistrates' court. These non-custodial powers are insufficient where the asset is a house. The only option is to apply to the county court for a charging order and subsequently an application for an order for sale in the High Court or county court, and this can only be done once time for payment has expired. The only powers that the magistrates' court has in relation to a bank account is to make a payment order, if the confiscation order is made under POCA 2002; or an application for a third party debt order to the county court, for confiscation orders made under the pre-POCA 2002 legislation.[1387] Applications to the county court have an in built delay and cost, and are complicated. The only other powers in relation to houses and bank accounts exist if the prosecution applies for a restraint order and a receiver but these orders are not always applied for[1388] and are not powers available to the magistrates' court.

7.2 Civil Means of Enforcement

Civil means of enforcement can be used by the magistrates' court in a number of scenarios. They can be used prior to the default term being activated as activation should be the last resort. However, it is submitted that not all of them would be suitable prior to

[1385] These were first raised in 1991 in the Working Group First Report (n 137) 8.
[1386] Bullock and others (n 29) 20; Brown and others (n 173) 13.
[1387] The only other way money in a bank account can be seized is if there is an application for a restraint and receivership order, but these are not options available to the magistrates' court.
[1388] There are a number of issues which appear to prevent the effective use of restraint, but there have been calls for empirical research into why this is the case, Wood, The Big Payback (n 5) 5-6.

such activation either because of the amount of the confiscation order, or because it would cause delay if they subsequently fail, or because they are simply not suitable for the asset involved. Civil means of enforcement are often the only option available after the default term has been served because the powers of the magistrates' court are limited. They may be the only option available if the reasonable time rights of the defendant in article 6(1) have been breached.[1389] Following *Gibson* they are the only way the magistrates' court can enforce interest unless the prosecution can apply to the Crown Court for an increase in the default term.[1390]

In relation to the non-payment of a fine, the alternatives that the magistrates' court must consider (but not necessarily try) before issuing a default sentence subsequent to imposition are a warrant of control (formerly known as a distress warrant), an attachment of earnings order, an attendance centre order, a money payment supervision order, or enforcement in the High Court or county court which includes an application for a third party debt order, a charging order or an order for sale.[1391] Although not specifically mentioned in section 82(4A) MCA 1980, an application for deductions from benefits should be considered.[1392] If these fail or are not suitable then the ultimate sanction of the magistrates' court is to activate the default sentence.

It is submitted that not all of these are suitable for the enforcement of confiscation orders. For example, an attendance centre order requires a defendant to attend at a centre for a number of hours set by the magistrates' court. If the defendant completes some or all of the hours, the financial penalty is reduced accordingly.[1393] This is an alternative to a default sentence for fines based enforcement which is not suitable for a confiscation order as the only way a confiscation order can be satisfied is by payment.[1394] Even if the

[1389] For example, *Flaherty* (n 1358).
[1390] *Gibson* (n 12).
[1391] MCA 1980, s 82(4A).
[1392] *R v Northampton Justices ex parte Ferguson* (Div, 2 December 1999). It is suggested that if there is a collection order in place a clamping order and fine registration should be considered. If available a payment order should also be considered.
[1393] PCC(S)A 2000, s 60(12).
[1394] POCA 2002, s 38(5).

defendant completes the attendance centre order, he would still need to pay the confiscation order and any interest, and would still be liable to be sent to prison for non-payment of the confiscation order. The fact that an attendance centre order is specifically excluded for youths in the confiscation legislation[1395] adds further weight to the argument that it is not a suitable alternative.

7.3 Civil means of enforcement and confiscation orders

There was a recommendation in the Working Group First Report that the Crown Court should elect the method by which a confiscation order should be enforced.[1396] This chapter analyses the alternatives to the default term which are suitable for the enforcement of a confiscation order and makes recommendations in relation to charging orders.

7.3.1 An attachment of earnings order and an application for a deduction from benefits

The magistrates' court has the power to make an attachment of earnings order (AEO).[1397] Although there are limited powers to make an order before default[1398] normally the court will make the order when the defendant is in default. The information about the defendant's employment can come from him directly, or information can be requested from Her Majesty's Revenue and Customs in order for the court to make a decision whether or not to make the AEO.[1399]

The amount which can be deducted from a defendant's salary is set by legislation.[1400] The defendant has to earn a minimum amount before a deduction can be made, which is set as a percentage which rises with the amount of income. For example, a defendant with a monthly salary exceeding £1,040 but not exceeding £1480 a month, would have 17

[1395] POCA 2002, s 35 (3)(b).
[1396] Working Group First Report (n 137) 8-9.
[1397] The powers to make an attachment of earnings order are contained in the Courts Act 2003, sch 5 and the fines officer has the power to make the application if there is a collection order.
[1398] If there is a collection order and the defendant requests it, Courts Act 2003, sch 5 parts 3, 6.
[1399] Courts Act 2003, sch 5 para 9A.
[1400] The Fines Collection Regulations 2006, SI 2006/501, part 3.

per cent of their salary deducted, and 17 per cent of £1400 is £238 a month. For an income of more than £1480, the percentage deduction is 17 percent for the first £1480 and then 50% for the remaining income.

Confiscation orders are usually for relatively large sums and interest accrues once time for payment has expired and would continue to accrue whilst the AEO is in force. The magistrates' court would therefore have to determine what would be a reasonable period to receive the full payment of the confiscation order including interest. It is the experience of the research author that an AEO is only suitable prior to the default sentence being served if the defendant has received a non-custodial sentence for the offence which attracted the confiscation order and the order is for a small amount. However, in practice this is not usually a suitable alternative to the default term as it would take an unreasonably long time to pay the order and the interest accruing can be higher than the amount paid. Not only would interest accrue while the AEO is in force, which on a large confiscation order can be substantial, if the attachment of earnings order fails then there may be a delay in the enforcement of the order. Any assets identified at the Crown Court could be dissipated and a lengthy delay may preclude further enforcement. Based on the practical experience of the research author this is more likely to be an option for the court after the default sentence has been served if there are no other means of enforcement.

Similar issues apply to applications for a deduction from benefit order. The application is made to the Secretary of State for the Department for Work and Pensions (DWP) for a deduction from the defendant's benefits. The grounds for making an application for a deduction from benefits are very similar to an attachment of earnings order[1401] Deductions can be made from income support, universal credit, state pension credit, jobseeker's allowance or employment and support allowance[1402] and the rates of deductions are governed by statute but if there are already deductions being taken from the benefit by the

[1401] The court and the fines officer have the same powers under the Courts Act 2003, sch 5 but the court also has a power in the Criminal Justice Act 1991, s 24.
[1402] The Fines (Deductions from Income Support) Regulations 1992, SI 1992/2182, reg 2.

DWP, the court may receive a very small amount relative to the amount of the confiscation order. For example, if the defendant is receiving Universal Credit, the maximum amount which can be deducted is £108.35 per month,[1403] but this depends on the amount received by the defendant in benefit, in practice it could be a lot less. If the court applies for a deduction from benefit order, interest will still accrue and will be paid over a lengthy period of time. It is likely to be even less suitable for the enforcement of a confiscation order prior to the default term than an AEO and in practice tends to be used after the default term has been served and there are no other means of enforcing the order. Even then it will take a long time to satisfy the order and given the interest rate of 8% per annum, may not even cover the interest which is accruing.

7.3.2 Warrant of control (formerly known as a distress warrant)

There are limited powers for the magistrates' court to make an order for a defendant's assets to be seized and sold to pay a confiscation order. The main one is the power to issue a warrant of control which until 6 April 2014 was known as a distress warrant.[1404] There are references in case law and commentaries to distress warrants and any references to warrants of control in this research also apply to distress warrants and vice versa.

The law in relation to a warrant of control is governed by Part 3 and Schedule 12 of the TCEA 2007, along with the associated Regulations,[1405] and the Criminal Procedure Rules.[1406] A warrant of control gives an enforcement agent[1407] rights to enter property and seize and sell goods to pay the confiscation order, or enter into a controlled goods agreement which allows the defendant to keep the goods but subject to agreeing not to

[1403] Fines (Deductions from Income Support) Regulations 1992, SI 1992/2182, reg 4(1B).
[1404] The name was changed with the introduction of the relevant provisions of the Tribunals, Courts and Enforcement Act (TCEA) 2007, s 62.
[1405] The Taking Control of Goods Regulations 2013, SI 2013/1894 and The Taking Control of Goods (Fees) Regulations 2014, SI 2014/1.
[1406] CrimPR Part 30.
[1407] Formerly known as a bailiff.

dispose of or sell the goods until the debt is paid.[1408] Certain goods are exempt and cannot be taken and sold, for example goods needed for the defendant's employment or business up to a value of £1350, and goods to meet the basic domestic needs of the defendant and their family.[1409] Goods that are taken can be sold by the Enforcement Agent by public auction, or another method authorised by the magistrates' court.[1410] There are fees and disbursements which can apply, which the defendant must pay before anything is paid towards the confiscation order, and the fees are set by the Regulations.[1411]

Key frustrations amongst police and CPS in 2012 were the fact that defendants were not obliged to sign consent forms to allow assets to be sold to satisfy the confiscation order[1412] and that the legislation does not require assets to be identified or allow them to be sold to satisfy the confiscation order. These concerns were met in part by the only other option for selling assets available to the magistrates' court which were brought about by changes to POCA 2002 brought into force in 2015. The new provisions provide that if there is a restraint order in force items seized under another power can be retained even after the original power has ceased to exist.[1413] In addition, changes were made to allow for the search, seizure, detention and sale of property that could be disposed of or diminished in value and which could be used to satisfy a confiscation order that has been made or may be made in the future.[1414]

However, these new powers depend on an application to the court, for example by the prosecutor or financial investigator[1415] whereas a warrant of control can be issued by the court of its own volition. Therefore, a warrant of control is an essential power of the

[1408] TCEA 2007, sch 12 para 13.
[1409] The Taking Control of Goods Regulations 2013, SI 2013/1894, reg 4.
[1410] The Taking Control of Goods Regulations 2013, SI 2013/1894, reg 41.
[1411] The Taking Control of Goods (Fees) Regulations 2014, SI 2014/1.
[1412] Brown and others (n 173) 13.
[1413] POCA 2002 s 41A.
[1414] POCA 2002, ss 47A-47S, 67A-67D.
[1415] POCA 2002, ss 47M(3), 67A.

magistrates' court, although one can only be issued by the magistrates' court once time for payment has expired.[1416]

A warrant of control is issued by the magistrates' court using their standard enforcement powers under section 76 MCA 1980, which can take effect immediately; or it can be postponed for the defendant to pay as ordered by the court.[1417] If the warrant is suspended it is similar to a suspended warrant of commitment (or default term) as the warrant of control could be suspended to pay in full by a certain date, or by instalments. For example, the issue of the warrant could be postponed for the defendant to pay in full within 14 days. If the defendant does not pay as ordered then the warrant of control will be issued. Unlike the activation of the default term, there is no requirement for a further appearance by the defendant or a further inquiry into means before the warrant of control is issued. However, in practice a suspended warrant of control is rarely ordered, and usually a warrant of control takes effect immediately.

In practice, warrants of control are used frequently for the enforcement of confiscation orders, but time for payment has to expire before a warrant can be issued, meaning there is a delay between the confiscation order being made at the Crown Court and the warrant issued in the magistrates' court. Because time for payment has expired interest accrues until the goods are sold so the sale will need to cover the interest as well.

The use of warrants of control has been identified in previous research as useful for items suitable for quick and inexpensive means of realisation such as motor vehicles and jewellery[1418] and in practice, if the defendant has realisable assets then the warrant is a useful tool for the magistrates' court. It is often a suitable alternative for the court to consider prior to the default term being activated, depending on the amount of the

[1416] MCA 1980, s 76.
[1417] MCA 1980, s77.
[1418] Sutherland Williams, Hopmeier and Jones (n 58) 284. If there is a collection order in force, a clamping order gives the right of the clamping contractor to apply to the magistrates' court for an order to sell the vehicle but this power is rarely used in practice.

confiscation order and the value of the available assets. However, the court can also issue a warrant after the default term has been activated.

The enforcement agent can seize and sell any goods that are not exempt, whether they have been identified as an asset at the Crown Court or not. If the asset has been identified at the Crown Court it will have had a value put on it, but because of any delay in selling the item, it may not be sold for the value placed on it when the confiscation order was made. If the defendant does not have any other assets, then it can lead to an application by the defendant to vary the confiscation order downwards.[1419] Despite any limitations, a warrant of control is a useful enforcement action for the magistrates' court and can be used as an alternative to activating the default term, although it cannot be used for monies in bank accounts or where the asset is a house.

7.3.3 Enforcement in the High Court or County Court which includes an application for a third party debt order, a charging order or an order for sale.

In order for a confiscation order to be enforced in the High Court or county court the confiscation order is treated as if it is due to the designated officer for the magistrates' court[1420] and an application cannot be made until the time for payment granted by the Crown Court has expired.[1421]

The powers to make an application to the High Court or county court to enforce a confiscation order (and any other financial penalty enforced in the magistrates' court) are contained in section 87 of the MCA 1980 but not all of the enforcement powers in the High Court or county court are available as an enforcement action to the magistrates' court.[1422]

Where a confiscation order is not paid as ordered, the designated officer can make an application to the county court without any further reference to the magistrates' court.

[1419] POCA 2002, s 23.
[1420] MCA 1980, s 87(1).
[1421] POCA 2002 s11.
[1422] For example a writ of control or attachment of earnings order is not available, MCA 1980, s 87(1).

There is no requirement for a means inquiry by the magistrates' court to see if the defendant has the means to pay forthwith before an application to the county court can be made in relation to a confiscation order, because section 87(3) MCA 1980 is disapplied in relation to confiscation enforcement.[1423] The effect of this is that if there is no collection order in force a means inquiry is not required before the designated officer applies to the county court.[1424] This takes out a step in the enforcement process in the magistrates' court internal process, but does not assist when the application is made by the designated officer in the county court. The designated officer is the office holder who makes the application[1425] and is treated like every other judgment creditor.

The common applications made by the designated officer are third party debt order, charging order and order for sale applications, although they are not widely used because of the issues involved.[1426] Third party debt orders have already been analysed and compared to payment orders[1427] and applications for charging orders are considered next.

7.4 Applications for Charging Orders by the designated officer-the legislative background

There is a power in the pre-POCA 2002 legislation for charging orders to be made in the High Court[1428] but there is no power for the Crown Court to make a charging order in POCA 2002. The power to apply for a charging order in relation to a confiscation order is by the designated officer[1429] making an application to the High Court or county court.

[1423] DTOA 1986, s 6(4); CJA 1988 s 75(5); DTA 1994, s 9(4); POCA 2002, s 35(3).
[1424] If a collection order is in force then the fines officer would need to conduct a means inquiry and find that the defendant has the means to pay forthwith, MCA 1980, s 87(3A). However, as collection orders are not used widely in relation to confiscation orders, *Lawson* (n 1242), the applicant is likely to be the designated officer for the magistrates' court and this thesis concentrates on applications made without a collection order.
[1425] *Krager* (n 1240).
[1426] Brown and others (n 173) 13; Joint Thematic Review (n 3) 44.
[1427] In chapter 5, text to n 1026-n 1146.
[1428] DTOA 1986, s 7, CJA 1988, s 76 as amended, and DTA 1994, s 25.
[1429] MCA 1980, s 87.

Unless otherwise noted, this chapter analyses the process for applying for a charging order in relation to land which includes a house. This is because an application in relation to land is the most common form of charging order generally[1430] and, in relation to confiscation orders under the pre-POCA 2002 legislation, if charging orders were made at all, they were made in relation to land.[1431] In addition, applications for charging orders in relation to houses have been made by HMCTS and are reviewed in this chapter. As in the rest of the thesis, the process will describe the relevant provisions of POCA 2002 unless other information is relevant.

7.4.1 Charging orders: the background

The Charging Orders Act 1979 makes provision for imposing charges (a charging order) to secure payment of monies under judgments or orders of court, to restrain and prohibit dealings with certain securities and for making payments in respect of those securities.[1432] A charging order can be made in relation to land, certain securities[1433] and funds in court and the charge can be extended to any interest or dividend in relation to the asset.[1434]

The appropriate court to hear the application in relation to financial penalties enforced by the designated officer using powers given under section 87 of the MCA 1980 will be the High Court or county court. The designated officer is deemed to be a judgment creditor and the defendant a judgment debtor, as a result the designated officer is in the same position as any other judgment creditor with the same rights and responsibilities.[1435] This means that the designated officer for the magistrates' court must first complete the same forms as anyone else in the same position. They must apply to register the debt[1436] and

[1430] Vos (n 1126) vol 1, 2190.
[1431] *Mitchell Taylor and Talbot* vol 1, para 3.061 (R0: February 2002).
[1432] Charging Orders Act 1979, preamble and s1.
[1433] Government stock, stock of an incorporated body in England and Wales other than a building society, stock registered in England and Wales even if the body is incorporated outside of England and Wales, and unit trusts if the register is kept within England and Wales Charging Orders Act 1979, s 2(2)(b).
[1434] Charging Orders Act 1979, ss 2(2)(c), 3.
[1435] *Gooch v Ewing (Allied Irish Bank Ltd., Garnishee)* [1986] QB 791 (CA).
[1436] using form N322B, 70 PD 4.1.

apply for an interim charging order.[1437] They must also do all the relevant land registry checks paying the necessary fees to them as well as paying the relevant fees to the county court.

Most applications for charging orders are made to the county court[1438] and the applications are governed by the Civil Procedure Rules and associated Practice Direction.[1439] An official copy from the Land Registry is often used as evidence of ownership of the property[1440] which can be obtained from the land registry for a fee.

Unlike a charging order in the pre-POCA 2002 legislation, the charging order is not made in the value of the property from time to time, subject to the value of the confiscation order, but the value of the confiscation order plus interest. In practice this means that the charge secures the value of the debt even if the amount recoverable will be less than that. For example, there could be a £1 million confiscation order, and the charging order will be made in that amount, even if the property is only worth £250,000. A charging order in relation to land gives the judgment creditor security equivalent to a mortgage over the land but is subject to any prior mortgage or charge.[1441] It does not stop the person subject to the charge taking steps to sell the property but it does mean that the designated officer must be notified of the sale as there will be a restriction or notice registered at the Land Registry. As such it has been described as an 'indirect method of enforcement'[1442] because it merely secures the debt it does not satisfy it. Therefore, like a restraint order its description as an enforcement power could be seen as a misnomer.[1443]

When an application is made, the county court will consider the personal circumstances of the debtor, and whether any other creditor of the debtor would be likely to be unduly

[1437] using form N379, 73 PD 1.1.
[1438] Lord Neuberger and others, (eds), *The Civil Court Practice 2018* (LexisNexis Butterworths 2018) Procedural Tables, Table 30 para 3.
[1439] CPR Part 73 and Practice Direction 73.
[1440] Lord Neuberger and others (n 1438) Procedural Tables, Table 30, para 5.
[1441] ibid vol 1, 2362.
[1442] ibid vol 1, 2362.
[1443] Confiscation is often described as a misnomer, text to n 470-n 473.

prejudiced by the making of the order, before deciding whether to make a charging order.[1444] There is no right to a charging order as it is discretionary,[1445] but the court will take into account all the relevant circumstances[1446] and a judgment creditor should expect that an order will be made unless the judgment debtor can persuade the court that in all the circumstances of the case an order should not be made.[1447] Because the debt is a confiscation order the county court must take into account the legislative steer contained in section 69 POCA 2002 which applies to charging order applications made by the designated officer to the magistrates' court.[1448] If there is a restraint order in force, the county court must give the person who applied for the restraint order and any receiver the opportunity to be heard before staying the proceedings or allowing them to continue.[1449]

There are also general principles about charging orders that are relevant to applications made in relation to unpaid confiscation orders. There are no rules or presumptions in relation to the amount of the debt as compared to the value of the property subject to an application for enforcement in the High Court or county court.[1450] When an argument was advanced that an order for sale should not be made because the size of the debt was small compared to the value of the property (the debt was £35,000 and the value of the property was more than £15 million) it was held that the disparity in itself was not a reason for not granting the order and these are only two factors to be taken into account along with the absence of enforcement actions and the conduct of the parties.[1451] The argument

[1444] Charging Orders Act 1979, s 1(5)(a)-(b).
[1445] Vos (n 1126) vol 1, 2194.
[1446] Charging Orders Act 1979, s 1(5).
[1447] *First National Securities Ltd v Hegerty and another* [1985] QB 850 (HL).
[1448] The legislative steer means that any powers must be exercised with a view to making the value of realisable property available to satisfy any confiscation order that has or may be made.
[1449] POCA 2002, s 58(5)-(6). Since the changes to POCA 2002 made by the SCA 2015, the county court is also bound by any determination made by the Crown Court under s10A POCA 2002. The rights of third parties will be taken into account and if there was no determination under section 10A this could involve the re-litigation of issues already subject to hearings at the Crown Court in either the confiscation order hearing or any hearings in relation to restraint.
[1450] Vos (n 1126) vol 1, 2202.
[1451] *Packman Lucas Limited v Mentmore Towers Limited and Charles Street Holdings Limited* [2010] EWHC 1037 (TCC).

that the greater the value of the property, the greater the chance that the defendant would avoid a charging order or order for sale 'offends common sense'.[1452]

7.4.2 Discharge or variation

A charging order can be varied or discharged, but the application must be made to the court which made the charging order.[1453]

7.4.3 Enforcement of a charging order

A charging order made in the county court or High Court is enforced by an application for an order for sale.[1454] If the charging order has been made in favour of the designated officer for the magistrates' court then they will be the applicant for the order for sale.

However, a charging order is a security of the debt and like any other asset, the defendant does not have to sell the property to satisfy the confiscation order. Nor does the designated officer have to apply for an order for sale before the magistrates' court can consider whether or not to activate the default term. This will depend on the facts of each case as the onus is on the defendant to satisfy the order, even where there is a restraint order in force.[1455] When the confiscation order plus interest and costs are paid in full, the charge will be removed.

[1452] ibid [26] (Coulson J).
[1453] CPR 73.10B.
[1454] CPR 73.10C. The enforcement of a charging order is by a claim for an order for sale of the property subject to the charging order. If the charging order was made at the County Court Money Claims Centre the claim must be made to the judgment debtor's home court or if it was not made at the CCMCC, the court which made the charging order, unless the court does not have jurisdiction to hear it CPR 73.10C(2)-(3). The court has a discretion whether or not to order the sale and an order for sale is viewed as a draconian step, Vos (n 1126), vol 1, 2203.
[1455] *Popoola* (n 1198).

7.5 Applications for Charging Orders by the designated officer-in practice

Some of the review documents have considered the powers of the magistrates' court to make an application for a charging order, or third party debt order[1456] which is similar in practice. The Working Group Third Report saw scope for the increased use of charging orders in the pre-POCA 2002 legislation by making a recommendation that would give what is now the designated officer[1457] the power to apply for a charging order and a receiver to enforce the order in the county or High Court. The power to apply was seen as necessary otherwise the magistrates' court had no power to enforce a confiscation order against a property.[1458] Running alongside this was a recommendation that they should be able to deduct their costs from the confiscation order monies in the same way that a receiver does.[1459]

The Working Group Third Report also made recommendations to improve the way in which applications for garnishee orders were made, in part because it found that applications are not made in practice because of the costs involved.[1460] The recommendations in the Third Report do not address the difficulties in the county court identified by the Working Group First Report that justices' clerks were reluctant to apply for those orders because the process is 'tortuous' and costly.[1461] The process for a charging order is similar to the process for applying for a third party debt order, and it is the experience of the research author that the findings of the Working Group First Report still apply to both types of application.

There was a recommendation in the Third Report for the designated officer to apply for a charging order in the county court or High Court using the pre-POCA 2002 legislation,

[1456] Third party debt orders replaced garnishee orders on 25 March 2002. Some of the review documents refer to garnishee orders.
[1457] Some of the review documents refer to applications made by the justices' clerk. This role is now undertaken by the designated officer, n 22.
[1458] Working Group Third Report (n 126) 2.37.
[1459] ibid 2.33-2.37.
[1460] ibid 2.33-2.36.
[1461] Working Group First Report (n 137) 8.

however it is submitted that would create the same practical issues as applying in those courts using Part 3 of the Magistrates' Courts Act 1980 in relation to costs and re-litigation. Instead it is recommended that a change in the legislation should be introduced to allow the Crown Court to make a confiscation charging order, if necessary to be enforced by the designated officer, which would better meet the issues involved. The process for applying for a charging order using the magistrates' court's fines based powers has not changed, and although a review of applications made by HMCTS show that although the difficulties still exist, the benefits of the charging order process should be considered further.

7.5.1 Support for the use of charging orders

The use of charging orders was not only suggested by the Working Group Third Report but is supported by other review documents that have considered the issue since 2002. In 2010, it was reported that the use of what was referred to as 'civil enforcement powers', for example charging orders and orders for sale, had not been taken up universally. Cost was seen as a barrier and lessons learned were being shared.[1462]

In 2012 Brown et al reported that the use of charging orders, such as those applied for by HMCTS, were seen by interviewees as an effective means of enforcement that had not been 'satisfied through the standard enforcement process'.[1463] They also identified that the use of what were referred to as 'civil enforcement powers' which included 'charging orders against the home' sent out a powerful message to communities and could improve community confidence.[1464] The NAO Report recommended that the current enforcement options should be reviewed and the introduction of wider powers such as charging orders should be considered.[1465] However, none of these review documents considered the difficulties encountered by the designated officer when applying to the county court. It is

[1462] Joint Thematic Review (n 3) 44.
[1463] Brown and others (n 173) 13.
[1464] ibid 13.
[1465] NAO Report (n 71) 9.

within the knowledge of the research author that HMCTS does have some experience of making such applications and that the difficulties highlighted in the First and Third Working Group Reports still exist.

Charging orders were not included in POCA 2002 because they were used rarely in relation to confiscation, and if at all, in relation to land, which includes a house.[1466] It was felt that the property that could be made subject to a charging order could also be made subject to a restraint order or enforced in some other way and so they were not needed.[1467] Given the analysis of charging orders in this chapter, the analysis of charging orders under the pre-POCA 2002 legislation, and the use of restraint with associated issues, it is recommended that the time has come to revisit the decision made when POCA 2002 was introduced.[1468] This would help to 'redress the balance in favour of the authorities'.[1469]

7.5.2 A review of applications made for charging orders made by HMCTS in 2012

The experience of the research author supports the findings of the review documents that the magistrates' court does not have a lot of experience in applying for charging orders but expertise is needed.[1470] However, in 2012 HMCTS obtained a number of charging orders in relation to unpaid confiscation orders which was based on work by the North East Regional Confiscation Unit which had led the way in making these applications.[1471] These cases have been chosen for analysis in this thesis because they formed a discreet group of applications for which data was available and are within the knowledge of the research author through her employment.

[1466] *Mitchell Taylor and Talbot* vol 1, para 3.061 (R0: February 2002).
[1467] *Proceeds of Crime Bill: Publication of Draft Clauses* (n 31) para 2.13.
[1468] The provisions were included in the original draft of the Bill, but subsequently removed.
[1469] NAO Progress Report (n 367) 30.
[1470] Brown and others (n 173) 14.
[1471] Saieed Kazi 'Civil Enforcement of Confiscation Orders-The North East Regional Confiscation Unit Pilot' [2011] (6) Proceeds of Crime Review: The Journal of Asset Forfeiture and Money Laundering 10, 10.

In all cases, HMCTS was the lead agency; the asset was a house which had been identified as an asset when the confiscation order was made at the Crown Court; and the defendant was named as the sole or a joint owner. Even though the asset had been identified as belonging to the defendant at the Crown Court, HMCTS had to in effect start again by making an enquiry with the Land Registry. As the designated officer for the magistrates' court is treated as a judgment creditor, the matter had to be re-litigated in the county court. This means that the debt had to be registered with the county court and the application made for the charging order. The forms had to be completed and submitted along with the appropriate fee; and the Land Registry and land title fees had to be paid.

All the applications were initially made at Leeds County Court and the total number of final charging order applications made as part of this process was 95, including those dealt with on a contested basis. However, in some cases there was more than one order per defendant because the defendant owned more than one property.

The amount of the debt (including interest) covered by the charging orders was £3,724,269.51 and the total costs awarded in favour of the designated officer for the magistrates' court was £28,753.00. HMCTS legal and administrative teams worked on the applications, but there were further costs involved as HMCTS paid for external representation for cases which were transferred to another court or contested.

The financial costs to HMCTS can be quantified, but there were other costs. Resources were used by HMCTS and it estimates that the average case took 1¼ hours of legal adviser time and 2½ hours of administrative time up to the point when the order was granted. This does not include the time taken to review the case on JARD to identify whether the case was suitable for a charging order, or any work undertaken after the charging order was granted.[1472] Nor does it include the time taken by those representing HMCTS on cases which were transferred or contested.

[1472] Which includes registering the charging order at the Land Registry.

The financial costs to HMCTS were as follows: the cost of each application to the county court was £100, the cost of the official copy of the Land Registry was £4.00, and the fee for the registration of the interim order at the Land Registry was £50.00; a total of an additional £154.00 per property. The costs to HMCTS of obtaining external representation at the transferred or contested hearings including fees, disbursements and VAT were £7,782.00.

HMCTS has not applied for orders for sale in relation to any of these charging orders to enforce them. Either the properties have been sold or the orders satisfied and the charging orders removed and as a result, substantial amounts have been collected. By February 2013, the amount collected as a result of the charging orders was £357,996 in relation to the outstanding confiscation orders and £2,038.00 in relation to the costs awarded. By 31 March 2015 this had increased to £928,680.68 in relation to the confiscation orders, and £8,699.00 in relation to the costs. On 20 April 2017 this had increased again to £1,794,167.91 paid in relation to the confiscation orders and £9,013.00 in relation to the costs.

In practice the difficulties involved in applying for charging orders in the county court first identified in 1991 in the Working Group First Report still exist and the financial and resource costs involved are not the only issue. The applications in 2012 involved a re-litigation and generated queries and objections from defendants and third parties,[1473] which it is submitted are best placed to be decided within the confiscation order proceedings in the Crown Court. The applications show a need for experience of the county court law, practice and procedure[1474] which is different to that of the magistrates' court. The process is complex and it is argued, puts the magistrates' court at a disadvantage. The designated officer has to apply to the county court for enforcement, rather than to the Crown Court as the prosecutor now does when the confiscation order is made under POCA 2002 and so is the opposite of the one stop shop envisaged when

[1473] Kazi (n 1471) 13.
[1474] ibid 13-14; Brown and others (n 173) 14.

POCA 2002 was introduced. If the prosecutor wants to apply for a restraint order or a receiver where the asset is a house, they apply to the Crown Court which has already determined the confiscation issues. There is no re-litigation on those points, nor does the prosecutor have to pay a fee to apply or prove the debt before the application can be heard.

When the applications were made, the county court had to hear information already put before the Crown Court. This involved a re-litigation of the issues in the county court. At the county court the designated officer is treated as any other judgment creditor and had to pay the relevant fees and prove the debt before the application can be made. If the house has been identified as an asset in the Crown Court then the judge would have all the information needed to make a charging order, a point Gardner made in relation to payment orders in 2009.[1475]

Like other aspects of the confiscation regime, it does not seem fair that the legislation allows the Crown Court to identify assets and determine shares in property and requires it to hand over the enforcement of the order to the magistrates' court without the powers to enforce against the asset. The magistrates' court has to use fines based powers when it was envisaged that applications for charging orders would be dealt with in the confiscation proceedings, leaving the fines based powers for less complex cases.[1476] The applications for charging orders in 2012 show that the orders can be effective, but in practice the process is as 'tortuous' now as when the Working Group Reports were written despite changes to the Civil Procedure Rules. There is therefore a need for an effective alternative.

7.5.3 Changes in procedure since 2012

Since applications were made on behalf of the magistrates' court in 2012, the Civil Procedure Rules have changed and applications for a charging order in these

[1475] Gardner (n 1101) 93.
[1476] 'The UK Drug Trafficking Offences Act 1986' (n 17) 1632.

circumstances must be made to the County Court Money Claims Centre.[1477] However, HMCTS would still have to register the judgment debt in a county court before using the expedited process for the charging order application and pay all the appropriate fees which in 2012 were £100 and are now £110 per application.[1478]

An application for an interim charging order now will be dealt with without a hearing[1479] and if the application is over an interest in land, may be dealt with by a court officer[1480] unless the court officer decides that it should be dealt with by the judge or unless any of the other criteria in Civil Procedure Rule 73.4(4) apply.[1481] An application can be made for the decision to be reconsidered by a district judge, although again this would be without a hearing.[1482] The court officer can make the interim charging order or a judge can make the interim order and transfer the decision whether to make a final charging order to the home court of the judgment debtor.[1483] On 1 August 2018 a pilot was started which applies to charging orders made at the County Court Money Claims Centre (CCMCC). In the pilot any unopposed charging order made at the CCMCC can be made by a legal adviser.[1484]

Whether or not there is a decision to transfer the final hearing, or a legal adviser makes an uncontested final order, HMCTS would still have to take steps which have already been taken for the confiscation order. For example, the designated officer has to serve the interim order and any documents for the final hearing on the judgment debtor and anyone else covered by the Rules, which includes any co-owner of the land; the spouse or civil

[1477] CPR 73.3(2).
[1478] Civil Proceedings Order 2008, sch 1 Fee 7.3(b).
[1479] CPR 73.4(2).
[1480] CPR 73.4(3).
[1481] The order may be made by the court officer unless any of the following apply: '(a) an application under section 2(1)(b)(i) of the 1979 Act; (b) an application for a charging order on the interest of a partner in the partnership property under section 23 of the Partnership Act 1890; (c) where an instalment order has been made before 1 October 2012; (d) where the court officer otherwise considers that the application should be dealt with by a judge.' CPR 73.4(3)-(4).
[1482] CPR 73.5.
[1483] CPR 73.4.
[1484] 51T PD. This pilot will run from 1 August 2018 until 1 April 2020.

partner of the judgment debtor if those details are known; or anyone else as directed by the court, and provide a certificate of service to the court in accordance with the Rules.[1485]

7.5.4 Would the use of charging orders improve the enforcement of confiscation orders and meet the purposes of the regime?

Figures have been obtained from HMCTS about the number of houses that may be available for a charging order in HMCTS led cases.[1486] This has been taken from JARD which is dependent on law enforcement agencies updating results.[1487] Therefore, information may be out of date and the property may no longer be owned by the defendant.[1488] As a result, the information must be viewed with caution but shows a large number of orders where buildings or land are available as an asset on imposition where HMCTS is the lead agency. The figures would need more in-depth analysis to see if a charging order would be appropriate but do identify cases where a charging order could be considered at the Crown Court in HMCTS led cases.

Like applications for third party debt and payment orders[1489] the Crown Court would have the information required for a charging order if the asset identified is a house. As a result, any applications for a charging order by the designated officer involves a re-litigation. The designated officer must also pay the same fees to the High Court and county court as any other applicant. The fee for a charging order application is now £110.[1490]

The fact that the designated officer has to apply to the county court for a charging order is the opposite of the one stop shop for confiscation at the Crown Court envisaged by the

[1485] CPR 73.7.
[1486] Figures obtained from HMCTS show that there were 1006 confiscation orders made between 2013 and 2017 which were outstanding as at 13 April 2017 in which HMCTS is the lead agency and a building or land was identified as an asset at the Crown Court. The value of these orders, including interest, is £190,948,722.56. As outlined this is the value of the confiscation order, not necessarily the property so even if charging orders were obtained it does not mean that they would satisfy the whole amount of the confiscation order.
[1487] *Asset Recovery Statistical Bulletin 2011/12-2016/17* (n 28) 11.
[1488] HMCTS has to make its own enquiries and over and above the information on JARD.
[1489] Gardner (n 1101) 93.
[1490] Civil Proceedings Order 2008, sch 1 Fee 7.3(b).

introduction of POCA 2002. The confiscation process, including enforcement should be as 'simple, predictable and effective as possible'.[1491] The use of the fines based powers of the magistrates' court to apply for charging orders is anything but simple. However, the benefits of the applications made in 2012 show an increase in collection rates. If charging orders could be applied for more easily by the designated officer, their use would improve the enforcement of confiscation orders and meet the purposes of the regime including ensuring that all confiscation orders are enforced, as well as increasing collections and allowing disruption to be measured.

The applications made by HMCTS in 2012 show that charging orders do bring in monies owed but the process for the designated officer making applications in the county court or High Court are as difficult now as they were when the Working Group Reports were written. It is recommended that the pre-POCA 2002 powers to make a charging order in the Crown Court are reconsidered and updated. They are compared with the powers for the designated officer to apply for a charging order in the next section.

7.6 A comparison of the charging order provisions

Before the magistrates' court can apply for a charging order in the county court, time for payment has to expire which means that the asset can be dissipated. This is unlike the charging order made in the High Court under the pre-POCA 2002 legislation which could be made at the same stages in the confiscation proceedings that a restraint order could, that is proceedings have started.[1492] When applying to the High Court or county court for a charging order, the designated officer does not have to prove dissipation before applying as it is an enforcement action. The order can be enforced by the designated officer making an application for an order for sale.

A charging order in the pre-POCA 2002 legislation is a direct alternative to a restraint order and so there has to be a risk of dissipation of assets before an order can be made.

[1491] *Ahmad and Ahmed* (n 12) [38].
[1492] DTOA 1986, s 7, CJA 1988, s 76, and DTA 1994, s 25. Although grounds have to be satisfied.

The legislative steer would apply in the same way as it does to a restraint order. A house has been found as particularly suitable for restraint[1493] but there is a perceived reluctance to use restraint orders.[1494] Therefore, it is suggested that an alternative enforcement power is required in the case of a house.

A charging order made at the High Court under the pre-POCA 2002 legislation can be enforced by a receiver by an order for sale. A receiver would be able to take fees and costs in the same way as one appointed to enforce a restraint order. A charging order under the pre-POCA 2002 legislation is made to the value of the property from time to time, subject to the value of the confiscation order. It could be made absolutely or subject to conditions including notifying the person holding any interest in the property to which the order relates, or when the order was to come into effect or become enforceable. When applying to the High Court or county court for a charging order, the designated officer does not have to prove dissipation before applying as it is an enforcement action. The order can be enforced by the designated officer making an application for an order for sale.

The advantage of reviewing the applications made by HMCTS in 2012 historically is that it shows how much has been collected without the need for any further enforcement action. A charging order is limited to the particular asset and is an indirect enforcement action. Therefore, it is suggested that it is less draconian and more proportionate than a restraint order. Sutherland Williams et al and Mitchell et al considered that a charging order or restraint order would be sufficient to preserve the property and make it available to satisfy the confiscation order.[1495] The fact that HMCTS did not need to apply for orders for sale

[1493] Bullock and others (n 29) 21.

[1494] Wood has called for empirical research into why this is the case, Wood, The Big Payback (n 5) 5-6. Even if restraint can be used, it is argued that there is still a need for an alternative where the asset is a house especially as an enforcement action after time for payment has expired and there is no risk of dissipation.

[1495] Sutherland Williams, Hopmeier and Jones only mention restraint (n 58) 69*; Mitchell Taylor and Talbot* mention both restraint and charging orders vol 1, para 3.063 (R0: February 2002).

to collect substantial sums of money shows that they were right and shows the effectiveness of the charging orders.

Bringing these pre-POCA 2002 powers and the county court applications together, a recommendation is made that the Crown Court should be able to make a confiscation charging order under POCA 2002 in two scenarios. One, as a direct alternative to restraint in the same situations as in POCA 2002, where there is a risk of dissipation. This could be in the same terms as in the pre-POCA 2002 legislation. The order should be capable of being suspended with the same powers of enforcement by a receiver by an order for sale.

However, if there is no risk of dissipation, the Crown Court should be given the option of making a suspended confiscation charging order in favour of the designated officer. This would be suspended until time for payment has expired when it would come into force unless the order is satisfied. This echoes the recommendation in the Working Group First Report that the Crown Court should elect the method by which a confiscation order should be enforced[1496] and would be akin to a compliance order which must be considered in every case.[1497] It would also fit in with the one stop shop nature of the confiscation regime and would mean that if the order is not satisfied that the magistrates' court has an indirect method of enforcing the order which will secure the property, and given the experiences of HMCTS will result in payment. The order should be capable of being enforced by the designated officer making an application for an order for sale which could be to the county court, as at the moment. Given the experiences of the HMCTS applications made in 2012, it is likely that the costs and fees will be less than that of a receiver. Any applications to vary or discharge would be made to the Crown Court.

A further recommendation is made that there could be a role for a compliance order if a suspended charging order is made. The views of the prosecution should be sought to

[1496] Working Group First Report (n 137) 8-9.
[1497] A compliance order can be made in the Crown Court to ensure that a confiscation order is effective, POCA 2002, s 13A.

enquire whether a compliance order is needed at the Crown Court if there is a need to sell the property to satisfy the confiscation order as a compliance order could be made with a condition that the property is not to be sold without giving notice to the prosecution. This could apply to third parties where there has been a determination under section 10A POCA 2002.

If there is a restraint order and no receiver, the magistrates' court can still enforce the confiscation order, including activating the default term but must give notice to the prosecutor. Even if a receiver has been appointed, the court can still enforce and there is an onus on the defendant to pay the order, not to wait for others to enforce.[1498] This is because there may be good reasons why enforcement by a receiver would not be appropriate, for example the costs of a receiver. In addition, it is not necessary for the court to try other means of enforcement before activating the default term, but only to consider them,[1499] although the appointment of a receiver is a consideration to be taken into account especially if the prosecutor is suggesting the appointment.[1500] It is suggested that the same principles would apply if there is a charging order in force, and that the designated officer for the magistrates' court would not necessarily have to enforce a charging order by way of an order for sale before the court could activate the default term. It would depend on the facts of each case.

The proposals would also fit in with and support the new provisions introduced by the SCA 2015 for different amounts to be given different time for payment. The amendments to the time for payment are not in themselves enough to ensure the confiscation order is paid and if the order is not paid within the time set by the Crown Court further enforcement is necessary. In addition to setting the time for payment for the amount equivalent to the house as an asset, the Crown Court could make an immediate or suspended charging

[1498] *Popoola* (n 1198).
[1499] For example, *On the application of Johnson* (n 1198) [38]-[39].
[1500] *Beach* (n 1262).

order. This would allow enforcement to begin as soon as an individual time for payment has expired where a house is an asset.

A house could be identified as an asset after imposition and as part of the confiscation order process. In this case the prosecutor could have the power to apply to the Crown Court for an order which would be enforceable by a receiver or designated officer depending on whether there is a risk of dissipation of assets. In either case the charge could be made in favour of the Crown where there is a risk of dissipation, as under the pre-POCA 2002 legislation. The Crown Court could then appoint a receiver to enforce the order. But in other cases, it could be made in favour of the designated officer who would then have the authority to enforce the order.

The importance of the role of the prosecutor in the enforcement of an order with a charging order (and a restraint order) was identified in the Third Report which recommended that in such cases the prosecutor would be the lead agency. Therefore, if the recommendation to introduce a confiscation charging order is adopted then the lead agency would be determined at the stage when the charging order is made. It would be the prosecutor if there is a risk of dissipation, or HMCTS if the charging order is to come into force when time for payment expires.

These proposals would mean that the agencies would have to work together, which should happen in any event. Like restraint a charging order is not a direct method of enforcement, it secures the debt. Unlike a restraint order, a charge does not prevent a defendant or third party from dealing with the property, but it requires them to notify the person who has the charge of the sale in accordance with any restriction or notice. As such it is less draconian and more proportionate than a restraint order and would be an effective alternative to restraint.

The Crown Court would have to put all the orders on the Forms 5050 and 5050A so that the magistrates' court is aware of the orders and the assets.[1501] In the case of a charging order, this means that the charging order can be registered at the Land Registry as soon as time for payment expires.

7.7 Conclusions of chapter

Earlier chapters have established that civil means of enforcement are the only means of enforcing a confiscation order after the default sentence has been served, and need to be used to enforce interest which is no longer included in the calculation of the default term. The only alternative is if the prosecution can apply to the Crown Court for an increase in the default term[1502] but this happens rarely in practice.[1503]

The default term should only be activated if there are no other options available and there is therefore a need for effective civil means of enforcement. This chapter has analysed the alternatives to the default term which are suitable for the enforcement of a confiscation order. Out of the current options a warrant of control is likely to be the most effective option. However, this does not help if the asset identified is a house. In 1998 the Working Group Third Report recommended powers for the magistrates' court to apply for charging orders, otherwise there are issues if the prosecution decide not to apply for a restraint or charging order[1504] and it is the practical experience of the research author that a need for improvement still exists.

There was a recommendation in the Working Group First Report that the Crown Court should elect the method by which a confiscation order should be enforced.[1505] The

[1501] There is a need for these forms to be completed with care, *Ghulam* (n 702) [91].
[1502] Criminal Justice (International Co-operation) Act 1990, s 15(2); CJA 1988, s 75A(2); DTA 1994 s 10(2); POCA 2002, s 39(5).
[1503] Brown and others (n 173) 13.
[1504] Working Group Third Report (n 126) 2.37.
[1505] Working Group First Report (n 137) 8-9.

analysis in this chapter leads to the conclusion that the Crown Court should have that option available if the asset is a house.

Although it involves a limited number of orders, the charging order applications made by HMCTS in 2012 gives some evidence to support a review of the law in relation to charging orders. The collection rates for confiscation orders where the charging orders were obtained by HMCTS are impressive but the process is tortuous and costly, is the opposite of the one stop shop envisaged when POCA 2002 was enacted.

Therefore, it is recommended that the benefits of charging orders can be achieved without the burden falling on the designated officer for the magistrates' court to make the application in the county court. Judges in the Crown Court are already used to making restraint orders and now have powers to make compliance orders and determinations under s 10A POCA 2002 and it is suggested that the power to make a confiscation charging order should also be added to their portfolio of orders. This would require a change in the legislation including a change to the Criminal Procedure Rules but would fit in with the purposes of the regime including the specific purpose in POCA 2002 to create a one stop shop for confiscation at the Crown Court.

Chapter 8 Conclusions and Recommendations

8.1 The research questions

This thesis asks and answers two questions. Firstly, how has the confiscation legislation developed in relation to the enforcement of confiscation orders in the magistrates' court? Secondly, what future legislative amendments might assist the enforcement of confiscation orders by the magistrates' court and create an alternative to restraint?

In order to answer the questions, it has been necessary to review the nature and development of the confiscation legislation and its impact on the magistrates' court. It has also been necessary to analyse the enforcement provisions in the POCA 2002 and pre-POCA 2002 legislation. This coupled with the critical and doctrinal analysis of the confiscation and fines based powers of enforcement available to the magistrates' court and the law of restraint, demonstrates the complex and cumbersome nature of the regime. The limited options available to the magistrates' court where the order is not satisfied, and the asset identified is a house or a bank account have also been analysed.

8.1.1 The development and nature of the regime

If the first thing to be aware of when describing a confiscation order is that the term is a misnomer[1506] then the second thing to be aware of is its complex nature. The regime is acknowledged to be draconian although the overall scheme is ECHR compliant. However, any order must be proportionate, and the defendant's article 6 and A1P1 rights must be considered on imposition and enforcement.[1507]

Enforcement cannot be looked at in isolation and therefore the imposition of orders has been considered. A confiscation order is made at the Crown Court, ancillary to sentence. It is a financial order made in the lesser of two figures, either the amount of the defendant's benefit from crime, or the available amount. The court will also set a default

[1506] Wood, Enforcing Criminal Confiscation Orders (n 2) 4.
[1507] These points are analysed in chapter 3, text to n 497-n 515.

term which the defendant is liable to serve if he does not pay in full. Assets available to satisfy the order will be identified by the Crown Court in most cases and that information will be passed to the magistrates' court which enforces the order. Because of the nature of the order, other criminal agencies assist with the enforcement of orders, and will take the lead in some cases until the order is paid in full, or there is no further assistance they can give.

The confiscation legislation has tightened the periods of time given to the defendant before the order has to be paid and interest accrues. There have also been recent developments which means the Crown Court can also now make a compliance order, and a determination under s 10A POCA 2002 to determine a defendant's share in an asset.

8.1.2 The purpose of enforcing confiscation orders

Despite the fact that the scheme has been in existence for over 30 years, there is still a lack of clarity about its purpose and aims. This research found agreement about the main purpose, which is to ensure that crime does not pay, but a lack of agreement on other aims. As a result, agencies and the government have found it difficult to assess the success of confiscation orders. Great store has been set in the past in the collection rates, but these are difficult to assess.[1508] The HAC 2016 Report concluded that both collection rates and disruption should be measures of success, acknowledging that the latter is difficult to measure.[1509]

The success of any enforcement power must be measured against all the aims and purposes identified in this research. All court orders must be enforced[1510] and there must be efficient and effective methods of enforcement.[1511] The purpose of activating the default term is not to punish the defendant but to ensure the order is paid.[1512] This

[1508] Text to n 580-n 584 in chapter 3.
[1509] Text to n 590-n 597 in chapter 3.
[1510] MOJ and HMCTS, Written evidence to the HAC 2016 (n 25) para 22. This is within the knowledge of the research author.
[1511] *Ahmad and Ahmed* (n 12).
[1512] *O'Connell* (n 79) [36].

research has identified a specific purpose in POCA 2002. The legislation has developed in a piecemeal fashion[1513] and one of the aims of POCA 2002 was to simplify the regime and move the making of all confiscation, restraint, charging and receivership orders to the Crown Court. This was described as creating a one stop shop for confiscation at the Crown Court.[1514]

This aim has been met in some areas. The Crown Court does indeed make all confiscation orders and restraint orders, appoints receivers and hears applications made by the designated officer for the magistrates' court for discharge in POCA 2002. It can also now make a compliance order, and a determination under section 10A POCA 2002 which add to the portfolio of orders available to the Crown Court. However, the High Court still deals with applications in the pre-POCA 2002 legislation and all other enforcement still takes place in the magistrates' court. It does not seem right that the legislation requires the Crown Court to identify all the information available to assess that an asset is available, which would allow it to make a payment order or charging order, but then has to send the order to the magistrates' court to enforce.

8.1.3 Restraint orders

In the same way that enforcement generally cannot be looked at in isolation, neither can the enforcement of confiscation orders in the magistrates' court and the critical analysis of the use of restraint orders and of receivers concludes that there is a place for these orders. Restraint orders are usually sufficient to ensure that an asset is available to satisfy a confiscation order,[1515] but there are issues.[1516] As a result, there is a perceived reluctance to use them and they can have costs implications which changes to the legislation have not addressed.[1517]

[1513] Text to n 202 in chapter 2.
[1514] *Proceeds of Crime Bill: Publication of Draft Clauses* (n 31).
[1515] Sutherland Williams, Hopmeier and Jones only mention restraint (n 58) 69*; Mitchell Taylor and Talbot* mention both restraint and charging orders vol 1, para 3.063 (R0: February 2002).
[1516] These are considered in chapter 4, text to n 935-n 974.
[1517] Text to n 949-n 950 in chapter 4.

The analysis revealed the existence of a little used alternative to a restraint order in the pre-POCA 2002 legislation, namely a charging order. These orders have also been critically analysed[1518] and compared with the power of the designated officer for the magistrates' court to apply for a charging order.[1519] This has led to the recommendations for the Crown Court to have the power to make charging orders which retain the spirit of a restraint order, which is to ensure the asset is available to satisfy the confiscation order, and would give the courts more proportionate and less draconian alternatives to restraint.

8.1.4 The enforcement of confiscation orders in the magistrates' court

The magistrates' court has to enforce all confiscation orders regardless of value or the type of offence which led to the conviction. There are two elements which govern the enforcement of confiscation orders in the magistrates' court, namely the provisions in the confiscation legislation, and the application of the fines based powers.

Like the rest of the regime, the confiscation based powers have developed in a piecemeal fashion which means the powers available are dependent on when the confiscation order was made. The use of the fines based powers of enforcement then adds a further level of complexity. It also causes difficulties for the judiciary trying to understand the various referrals in the legislation[1520] and interpret provisions which were designed for the enforcement of fines, not for the enforcement of confiscation orders.[1521]

The main sanctions for non-payment of a confiscation order are seen as the accrual of interest and the default term, but in themselves these can cause issues for the magistrates' court. Subsequent changes to the regime have made some improvements, particularly where the asset is cash in a bank account. Otherwise little has changed to the

[1518] Text to n 836-n 851 in chapter 4.
[1519] Text to n 1492-n 1501 in chapter 7.
[1520] Text to n 1225-n 1228 in chapter 6.
[1521] *Gibson* (n 12) [12].

powers of the magistrates' court to enforce the order and ensure that houses and bank accounts are available to satisfy the confiscation order.

Before activating the default term, the magistrates' court must consider whether there are any other options short of committal, known as civil means of enforcement.[1522] After the default term has been served, these are the only options available to the magistrates' court. Following *Gibson*[1523] they are also the only way the magistrates' court can enforce interest unless the prosecution can apply to the Crown Court for an increase in the default term.[1524] Previous research shows that this is rarely done in practice[1525] which is the experience of the research author. The Supreme Court heard that the civil means of enforcement are unlikely to be effective if the defendant has defaulted on the principal sum.[1526]

The analysis of the current civil means of enforcement shows that the main power likely to be suitable prior to the default sentence being activated is a warrant of control but it is not applicable if the asset is a house or money in a bank account. In those circumstances, the designated officer can apply for enforcement in the High Court or county court. The orders analysed in this research are a third party debt order where the asset is cash in a bank account; and a charging order where the asset is a house. The analysis shows that the processes are costly in time and fees. They are also cumbersome and are a duplication of effort.

Payment orders were introduced in POCA 2002 as an alternative to making applications for third party debt orders. There have been changes to these orders but there appears to be an unintended consequence that there is now an increased risk of dissipation if there is no restraint order in force. They have gone some way to reduce the complexities in the

[1522] *Lloyd* (n 530) [17].
[1523] *Gibson* (n 12). The Supreme Court held that activating the default term does not apply to the accrued interest.
[1524] Criminal Justice (International Co-operation) Act 1990, s 15(2); CJA 1988, s 75A(2); DTA 1994 s 10(2); POCA 2002, s 39(5).
[1525] Brown and others (n 173) 13.
[1526] *Gibson* (n 12) [19].

system and reduce the cumbersome nature of obtaining cash identified in bank accounts, but they are orders which can only be made in the magistrates' court if the confiscation order has been made under POCA 2002.

Without any power for the Crown Court to make specific orders in relation to houses to assist the magistrates' court, the only option for the magistrates' court is to use the power to apply for a charging order in the county court when time for payment has expired. Not only does this increase the risk of dissipation, it again adds to the complex and cumbersome nature of the powers of the magistrates' court.

The power of the High Court to make a charging order as an alternative to restraint in the pre-POCA 2002 legislation[1527] was rarely used.[1528] As a result, the provision was not included in POCA 2002.[1529] However, the use of charging orders by the magistrates' court examined in chapter 7 has proved to be of benefit. The fact that HMCTS collected substantial sums of money where the designated officer had obtained a charging order in the county court without further enforcement action shows that these orders can be as effective as restraint in ensuring that the confiscation order is paid, and the asset is not dissipated.[1530] Unfortunately, the tortuous nature of the process outweighs those benefits.[1531]

8.2 Recommendations

The title of this thesis is 'Improving the Collection and Enforcement of Confiscation Orders in the Magistrates' Court' but could be subtitled 'getting it right on imposition' because the recommendations are that the Crown Court is given more powers to make orders which will assist the magistrates' court when enforcing a confiscation order. They are

[1527] The powers to make a restraint order and charging order are contained in DTOA 1986, s 7, CJA 1988, s 76 as amended, and DTA 1994, s 25.
[1528] *Mitchell Taylor and Talbot* vol 1, para 3.061 (R0: February 2002).
[1529] *Proceeds of Crime Bill: Publication of Draft Clauses* (n 31) para 2.13.
[1530] Text to n 1471-n 1473 in chapter 7.
[1531] Text to n 1473-n 1476 in chapter 7.

recommendations which would simplify the law and make the enforcement of orders more efficient and reduce the complexities in the system.

The main recommendations are for the Crown Court to be able to make charging orders where the defendant has a house, and payment orders where they have a bank account identified as an asset. These recommendations would meet the purposes and aims of the regime to improve collection, meet the need for disruption and ensure that court orders are enforced in a timely way. In addition, they would add to the portfolio of orders available to the Crown Court in line with the purpose of a one stop shop for confiscation. They would address the need for an approach which goes from the cradle to the grave to make confiscation order enforcement more effective,[1532] and 'redress the balance in favour of the authorities'.[1533] Finally, they would provide additional non-custodial or civil means of enforcement and provide a cost effective and proportionate alternative to restraint. Changing the legislation would make the magistrates' court collection and enforcement more effective either by ensuring that assets are realised promptly to prevent interest accruing, or if interest does accrue in ensuring there are more effective powers available.

As well as providing that the time for payment should be linked to the asset, for example a longer period should be given if a property has to be sold, a recommendation is made that time for payment should also be linked to orders made at the Crown Court directly relevant to the assets identified. For example, time for payment in relation to a house would be linked to a confiscation charging order and cash in a bank account would be linked to a payment order. This is because the changes to the time for payment provisions are not enough in themselves to ensure that confiscation orders are paid promptly.[1534]

[1532] Wood, The Big Payback (n 5) 14; Levi and Osofsky (n 162) 59; Brown and others (n 173) 13.
[1533] NAO Progress Report (n 367) 30.
[1534] Text to n 1039-n 1043 in chapter 5.

There was a recommendation in the Working Group First Report that the Crown Court should elect the method by which a confiscation order should be enforced,[1535] and the Crown Court has an important role in ensuring that orders are enforceable.[1536] It is recommended that the new powers introduced by the SCA 2015 for the Crown Court to make compliance orders or a section 10A determination could be used more widely to support the main recommendations. A section 10A determination could be made available to the Crown Court at any stage where there is an application by the prosecutor. As judges in the Crown Court can make these orders, restraint orders and appoint receivers, it would be reasonable for them to also have the additional powers to make a payment order or confiscation charging order.

8.2.1 Recommendations for the Crown Court to make payment orders

It is recommended that the changes suggested by the First and Third Working Group Third Reports[1537] are revisited and that changes to the payment order provisions are introduced. The first recommendation is that the payment order provisions are extended and available in relation to confiscation orders made under the pre-POCA 2002 legislation as the powers of discharge have already been extended to pre-POCA 2002 orders.

Secondly there is a recommendation that the Crown Court should be able to make a payment order on imposition to ensure there is no dissipation of money in a bank account before the case is sent to the magistrates' court for enforcement. If the account has been identified as an asset at the Crown Court, it will have all of this information and would be in a position to make an interim order, rather than passing it to the magistrates' court to consider. The legislation, including the Criminal Procedure Rules, could be drafted so that the Crown Court could make an interim payment order with notice to the bank which, if

[1535] Working Group First Report (n 137) 8-9.
[1536] Both when making confiscation orders, for example *Ahmad and Ahmed* (n 12) and Hopmeier and Mills (n 675) 458; and ensuring the magistrates' court gets all the relevant information it needs to enforce an order by ensuring the forms 5050 and 5050A are completed carefully, *Ghulam* (n 702).
[1537] Text to n 1143 in chapter 5.

nothing is heard, becomes absolute on a given date. If an objection is received a hearing could be arranged in the magistrates' court and until then the interim payment order would remain in place.

If the bank account becomes known at a later date, the Crown Court and the magistrates' court should both have the power to make a payment order subsequently to the confiscation order being made. This means that either court could make an order alongside other orders it is considering.

Fisher suggests using a compliance order to require a defendant to transfer monies in an offshore bank account to a local bank account.[1538] If a compliance order is made in these terms, it would allow a payment order to be made and is a way of using compliance orders innovatively.[1539]

8.2.2 Recommendations for the Crown Court to make charging orders

A recommendation is also made that the pre-POCA 2002 power to make a charging order should be available, but as a power of the Crown Court with additional features. This charging order could be made in two circumstances. The first scenario would be as a direct alternative to restraint in the same situations as in POCA 2002, where there is a risk of dissipation. This means that a prosecutor or accredited financial investigator could apply where one of the five conditions which currently must be satisfied before a restraint order can be made applies.[1540] The charging order should be in the same terms as the CJA 1988 or DTA 1994, capable of being suspended and with the same powers of enforcement by a receiver and an order for sale.[1541]

If there is no risk of dissipation, it is recommended that the Crown Court should be given the option of making a suspended confiscation charging order in favour of the designated

[1538] Fisher (n 60) 759.
[1539] The innovative use of compliance orders has been suggested by Fisher, ibid 759; and Wood, The Big Payback (n 5) 7.
[1540] POCA 2002, s 40.
[1541] DTOA 1986, s 7, CJA 1988, s 76 as amended, and DTA 1994, s 25.

officer. The order would be suspended until time for payment has expired and would then come into force unless the order is satisfied. These recommendations echo those in the Working Group First Report that the Crown Court should elect the method by which a confiscation order should be enforced[1542] and could be seen as akin to a compliance order which must be considered in every case.[1543]

It is recommended that the legislation should allow for the order to be enforced by the designated officer applying for an order for sale which could be to the county court, as at the moment. Any applications to vary or discharge should be made to the Crown Court.

There could be a wider use of a compliance order if a suspended charging order is made. Consideration should also be given to making a compliance order with a condition that the property is not to be sold without giving notice to the prosecution or HMCTS. This would provide additional protection to prevent dissipation and could apply to third parties where there has been a determination under section 10A POCA 2002.

There would also be scope to use compliance orders innovatively where the Crown Court expects an asset to be sold to satisfy the confiscation order. When making a restraint order, the Crown Court can also make any orders to ensure that the order is effective.[1544] Either a similar provision could be introduced to accompany a confiscation charging order, or a compliance order could be used. It could require a defendant to market a house for sale, for example, within a certain timeframe, with a requirement to provide proof to the lead agency at named intervals. The order could also have requirements directed at an estate agent as it can be made against a third party. This could require them to provide details of whether the house is being marketed at an appropriate price and how many viewings have been undertaken. If offers have been made, they could also be required to give an opinion about whether any offers are reasonable.

[1542] Working Group First Report (n 137) 8-9.
[1543] A compliance order can be made in the Crown Court to ensure that a confiscation order is effective, POCA 2002, s 13A.
[1544] POCA 2002, s 41(7).

A house could be identified as an asset after imposition. In this case the recommendation is that the legislation should allow for the prosecutor to apply to the Crown Court for a charging order which would be enforceable by a receiver or designated officer depending on whether there is a risk of dissipation of assets.

The proposals would also fit in with and support the new provisions introduced by the SCA 2015 for different amounts to be given different time for payment. This would allow enforcement to begin as soon as an individual time for payment has expired where a house is an asset.[1545] As the order is limited to the particular asset and is an indirect enforcement action which does not prevent anyone dealing with the property,[1546] it is less draconian and more proportionate than a restraint order whilst achieving the same result.

In order for these recommendations to work, it is suggested that the Criminal Procedure Rules should be amended. It is recommended that the power to apply for a variation in section 23 POCA 2002 should be extended to the designated officer for the magistrates' court to mirror the power to apply to discharge. This would allow an application to be made if the house is sold for a sum less than the valuation at the Crown Court without the lengthy delays which can occur if the defendant is unaware that the order has not been satisfied or the expense of a defence solicitor being appointed. The legislation should ensure that the prosecution and defence are put on notice of the applications being made.

8.2.3 Recommendation for areas for further research

In addition to the main conclusions and recommendations, this thesis has identified areas suitable for further research. The Supreme Court has held that if the default term is activated, it does not cover any accrued interest[1547] and suggested that if it is intended that interest should be included in the calculation of the default term then legislative

[1545] Text to n 1039-n 1043 in chapter 5.
[1546] Lord Neuberger and others (n 1438), vol 1, 2362.
[1547] *Gibson* (n 12).

amendment is needed.[1548] It is recommended that this is an area suitable for further research.

Case law also highlights the complexities of using the fines based legislation for the enforcement of confiscation orders[1549] and it is suggested that this too is an area suitable for future research which should include the application of section 35 POCA 2002. This dictates which of the fines based enforcement powers are available to the magistrates' court when dealing with confiscation orders.

This research has also identified that there may be a role for the increased use of collection orders to enforce confiscation orders and the sanctions they bring. Future research should include an assessment of whether the use of registering the debt on the register of judgments, orders and fines is appropriate for the enforcement of confiscation orders.[1550] There have been calls for an increased ability to write off unenforceable accounts.[1551] This area of further research should also include the possibility of extending the current powers to discharge confiscation orders in POCA 2002 to the pre-POCA 2002 legislation.

A detailed analysis of the issues where a third party involved in confiscation proceedings is a company or a spouse falls outside the scope of this thesis, but it is suggested as an area suitable for future research, especially in the use of charging orders where the asset is the matrimonial home. This should also consider similarities to contract law and applications to set aside a legal charge due to claims of undue influence or misrepresentation by a spouse,[1552] and would supplement further research into the use of section 10A determinations in the Crown Court.

[1548] ibid [23].
[1549] *North Kent Magistrates' Court v Reid* (n 19), *Anscombe* (n 20) (Schiemann LJ); *Gibson* (n 12) [11].
[1550] Text to n 1242-n 1256 in chapter 6.
[1551] Text to n 1153-n 1154 in chapter 5.
[1552] n 777.

8.3 An Original Contribution to Academic Study

There is a twofold need for this research. In 2006 Vettori reported an almost complete lack of a review of the provisions to enforce confiscation orders from beginning to end.[1553] Although there has been research into the enforcement of confiscation orders since then, this has often concentrated on the provisions of POCA 2002, and the use of restraint.[1554] This thesis considers the enforcement powers generally, and specifically those of the magistrates' court for orders made under both POCA 2002 and the pre-POCA 2002 legislation, and meets the need first identified by Vettori.

There is also a need to improve the enforcement of confiscation orders and this research shows that when the regime was introduced 'the burden' of enforcing orders was given to magistrates' courts using their fines based powers, with larger and more complex cases being enforced in the High Court using restraint, charging and receivership orders.[1555] This shows how provisions are not used as intended because restraint is not used in all suitable cases, and charging orders did not survive in POCA 2002.[1556] This means in practice that fines based powers of the magistrates' court have been used in all types of cases. The fines based powers have not changed a great deal,[1557] and the introduction of payment orders only exists for confiscation orders made under POCA 2002. Coupled with the practical experience of the research author, the doctrinal and critical analysis in this thesis shows that there is a need for new powers where the asset is a house or cash in a bank account.

There are key aspects of this research which have made an original contribution to academic study. The methodology of critically analysing the review documents in chapter 2 of this thesis gives a wide perspective of the regime and the issues with the

[1553] Vettori (n 47) 20.
[1554] For example, Bullock and others (n 29).
[1555] 'The UK Drug Trafficking Offences Act 1986' (n 17) 1632.
[1556] *Proceeds of Crime Bill: Publication of Draft Clauses* (n 31) para 2.13.
[1557] A comparison of the provisions which mean that a confiscation order is enforced as a fine shows little difference, DTOA 1986, s 6(4); CJA 1988 s 75(5); DTA 1994, s 9(4); POCA 2002, s 35(3). Text to n 1216-n 1223 in chapter 6.

enforcement of confiscation orders since its inception. This has supplemented the doctrinal and critical analysis of the rules which apply to the magistrates' court when enforcing confiscation orders, an area which has received little academic attention.[1558] The critical analysis of the rules relating to restraint and charging orders both under the pre-POCA 2002 legislation and as an order made in the county court is a novel approach and adds to the previous research on the use of restraint orders.

The use of 'insider research' also adds a unique perspective. The experience of the research author has added to the scope and findings of the research.[1559] This means that she can comment from both an objective and subjective viewpoint as well as commenting on the practical implications of the regime. It also means that she was able to give importance to aspects which may not have been as easily identified by someone who did not have her practical experience.

This led to the analysis of the review documents in chapter 2 of this thesis. It also led to the analysis of the charging order provisions in the pre-POCA 2002 legislation in chapter 4 before being compared with the powers of the magistrates' court to apply for charging orders in chapter 7. As her starting point was the powers of enforcement available to the magistrates' court, it also led to the desire to find an alternative to restraint to assist the magistrates' court rather than just focus on the effectiveness of the powers of the Crown Court.

There is an historical aspect to this research which is still relevant as confiscation orders are still being made under the pre-POCA 2002 legislation and the magistrates' court is still enforcing such orders. Because of the subject covered, and the approach taken, this research offers a new perspective to the enforcement of confiscation orders and makes

[1558] Text to n 47-n 49 in chapter 1.

[1559] The research author is a solicitor employed within Her Majesty's Courts and Tribunals Service (HMCTS) with an interest in the enforcement of confiscation orders in the magistrates' court. She is writing in her personal capacity, the work is her own and the views contained in this thesis are that of the research author and do not necessarily represent the views of HMCTS, the Ministry of Justice (MOJ) or any of its employees.

recommendations for future legislative change. It also answers the call by Kruisbergen et all for more insight into the enforcement of confiscation orders to enhance understanding and 'point to possibilities to improve them.'[1560]

This research is topical. It reviews the law up to and including 31 December 2018 and analyses the changes to POCA 2002 introduced by the SCA 2015. There is parliamentary and inter agency interest in the enforcement of confiscation orders, and the Law Commission is undertaking a project to consider the effectiveness of confiscation orders, including their enforcement. As such this thesis will be of interest to lawyers, policy makers, criminal justice agencies and legislators.

[1560] Kruisbergen, Kleemans and Kouwenberg (n 54) 692.

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Munir v Bolton Magistrates' Court [2010] EWHC 3794 (Admin).

Norris, Re [2001] UKHL 34, 1 WLR 1388.

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Appendix 1 Statistics:

A Amounts of Confiscation Orders Collected 2012/2013-2017/2018[1561]

Year	Total Amount Collected Against Confiscation Orders
2012/13	£134,876,969.08
2013/14	£139,200,953.87
2014/15	£155,583,321.26
2015/16	£206,657,318.24
2016/17	£162,149,207.66
2017/18	£185,661,314.03

JARD, August 2018 (for 2017/18)

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[1561] *Asset Recovery Statistical Bulletin 2012/13-2017/18* (n 392) data tables <https://www.gov.uk/government/statistics/asset-recovery-statistical-bulletin-financial-years-ending-2013-to-2018> accessed 28 November 2018.

B **Confiscation Order Debt 2017-2018**

Confiscation Order debt as broken down in the HMCTS Trust Statement 2017-2018[1562]

	2017-18 £000	2016-17 £000
Interest (historically challenging to enforce)	657,595	568,067
Assets assessed as hidden with no other assets against which enforcement action can be taken.	432,800	359,078
Offenders deceased, deported or cannot be located	167,982	169,122
Orders subject to appeal and cannot be enforced	16,129	12,661
Assets overseas	10,596	7,766
Sub-total	**1,285,102**	**1,116,694**
Remaining confiscation order balance	676,176	698,124
Total outstanding debt	**1,961,278**	**1,814,818**

[1562] Extract from HMCTS Trust Statement 2017-18 (n 23) 13.

C Confiscation Order debt – value banding by lead agency[1563]

	HMCTS £000	SFO £000	CPS £000	2017-18 Total £000	HMCTS £000	SFO £000	CPS £000	2016 -17 Total £000
Gross debt								
Up to £250,000	213,210	36	46,804	**260,050**	205,765	456	47,072	**253,293**
£250,001 – £500,000	119,194	1,229	38,808	**159,231**	105,517	2,298	36,641	**144,456**
£500,001 – £1,000,000	167,075	2,504	57,570	**227,149**	154,260	2,450	54,083	**210,793**
Over £1,000,000	699,484	142,681	472,683	**1,314,848**	641,069	144,718	420,489	**1,206,276**
Total gross debt	**1,198,963**	**146,450**	**615,865**	**1,961,278**	**1,106,611**	**149,922**	**558,285**	**1,814,818**
Impairment								
Up to £250,000	185,383	29	30,363	**215,775**	182,650	406	33,648	**216,704**
£250,001 – £500,000	111,072	1,131	29,584	**141,787**	99,558	1,947	27,769	**129,274**
£500,001 – £1,000,000	160,204	2,354	46,922	**209,480**	147,006	2,130	44,380	**193,516**
Over £1,000,000	692,967	139,728	409,250	**1,241,945**	631,878	138,511	376,379	**1,146,768**
Total impairment	**1,149,626**	**143,242**	**516,119**	**1,808,987**	**1,061,092**	**142,994**	**482,176**	**1,686,262**
Net book value								
Up to £250,000	27,827	7	16,441	**44,275**	23,115	50	13,424	**36,589**
£250,001 – £500,000	8,122	98	9,224	**17,444**	5,959	351	8,872	**15,182**
£500,001 – £1,000,000	6,871	150	10,648	**17,669**	7,254	320	9,703	**17,277**
Over £1,000,000	6,517	2,953	63,433	**72,903**	9,191	6,207	44,110	**59,508**
Total net book value	**49,337**	**3,208**	**99,746**	**152,291**	**45,519**	**6,928**	**76,109**	**128,556**

The total gross debt is made up of 11,240 cases, of which: 10,282 (91.5%) are of value up to £250,000; 420 (3.7%) are between £250,001 – £500,000; 280 (2.5%) are between £500,001 – £1,000,000, and; 258 (2.3%) are over £1,000,000.

[1563] Extract from HMCTS Trust Statement 2017-18 (n 23) 43 figure 4.1.

D Confiscation Order Debt-aged debt profile by lead agency[1564]

	HMCTS £000	SFO £000	CPS £000	2017-18 Total £000	HMCTS £000	SFO £000	CPS £000	2016 -17 Total £000
Gross debt								
0 – 1 year	56,976	-	73,165	**130,141**	48,069	7,893	47,052	**103,014**
1 – 2 years	25,542	6,719	45,348	**77,609**	66,522	128	178,878	**245,528**
2 – 5 years	159,588	1,423	261,017	**422,028**	167,595	44,768	130,489	**342,852**
Over 5 years	956,857	138,308	236,335	**1,331,500**	824,425	97,133	201,866	**1,123,424**
Total gross debt	**1,198,963**	**146,450**	**615,865**	**1,961,278**	**1,106,611**	**149,922**	**558,285**	**1,814,818**
Impairment								
0 – 1 year	27,938	-	23,896	**51,834**	25,877	3,277	22,740	**51,894**
1 – 2 years	21,456	4,472	35,173	**61,101**	59,815	-	159,307	**219,122**
2 – 5 years	150,110	1,024	238,325	**389,459**	159,385	42,920	119,876	**322,181**
Over 5 years	950,122	137,746	218,725	**1,306,593**	816,015	96,797	180,253	**1,093,065**
Total impairment	**1,149,626**	**143,242**	**516,119**	**1,808,987**	**1,061,092**	**142,994**	**482,176**	**1,686,262**
Net book value								
0 – 1 year	29,038	-	49,269	**78,307**	22,192	4,616	24,312	**51,120**
1 – 2 years	4,086	2,247	10,175	**16,508**	6,707	128	19,571	**26,406**
2 – 5 years	9,478	399	22,692	**32,569**	8,210	1,848	10,613	**20,671**
Over 5 years	6,735	562	17,610	**24,907**	8,410	336	21,613	**30,359**
Total net book value	**49,337**	**3,208**	**99,746**	**152,291**	**45,519**	**6,928**	**76,109**	**128,556**

The total debt is made up of 11,240 cases, of which: 1,969 (17.5%) are between 0 – 1 years old; 998 (8.9%) are between 1 – 2 years old; 3,410 (30.4%) are between 2 – 5 years old, and; 4,863 (43.2%) are over 5 years old.

[1564] Extract from HMCTS Trust Statement 2017-18 (n 23) 44 figure 4.2.

Appendix 2 The review documents considered in chapter 2

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Criminal Justice Joint Inspection, *Joint Thematic Review of Asset Recovery: Restraint and Confiscation Casework* (2010) ('Joint Thematic Review').

The Drug Strategy 2010 Reducing demand, restricting supply, building recovery: supporting people to build a drug free life Annual Review – May 2012 (HM Government 2012).

2011-2014: Home Office Research and other Strategies

Local to Global: Reducing the Risk from Organised Crime (HM Government 2011) ('Local to Global').

Rick Brown and others, *The Contribution of Financial Investigation to Tackling Organised Crime: A Qualitative Study* (Home Office, 2012).

Secretary of State for the Home Department, *Serious and Organised Crime Strategy* (CM 8715, 2013) ('2013 Serious and Organised Crime Strategy').

Modern Slavery Strategy (H M Government 2014).

Modern Crime Prevention Strategy (Home Office 2016).

CPS Asset Recovery Strategy (Crown Prosecution Service 2014).

2011-2016 NAO and PAC reports

National Audit Office, Confiscation Orders (HC 2013-14 738) ('NAO Report').

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